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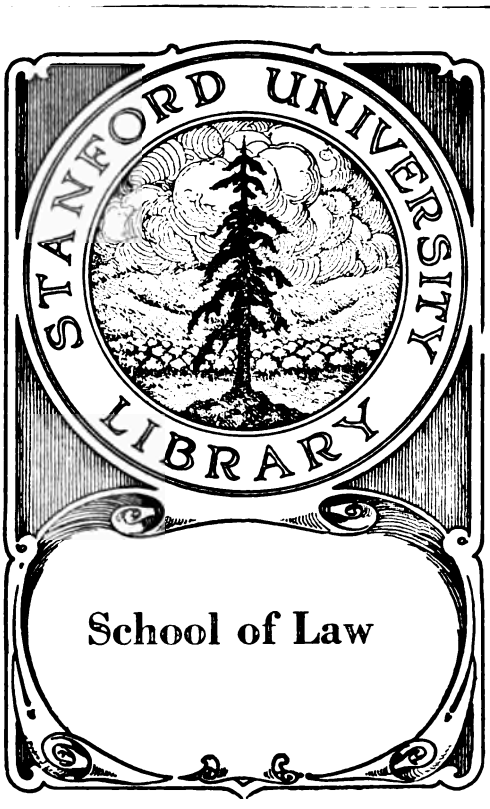

School of Law

12 17. 22474

THE CANADA LAW JOURNAL

EDITOR:
HENRY O'BRIEN, K.C.

ASSOCIATE EDITOR:
C. B. LABATT

VOL. XLIII.

FROM JANUARY 1 TO DECEMBER 31,

1907

TORONTO:
CANADA LAW BOOK COMPANY, LIMITED,
LAW PUBLISHERS,
32-34 TORONTO STREET.

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Canada Law Journal.

VOL. XLIII. JANUARY. NOS. 1 AND 2.

THE MONEY-LENDERS ACT, 1906.

Money-lenders have never been favoured children of the law, and Portia is not by any means the only judge who has won praise for astuteness in seizing upon a legal flaw in some Shylock's bond. Nevertheless it has been found in all ages of the world that the need of those who "have not," and the desire of those who "have," to have more, will find means of meeting each other, in spite of the innumerable laws that have been passed from time to time by the legislatures of every nation with a view to the suppression or regulation of the practice of usury.

As time went on and trade and commerce became more widely extended, the doctrines of political economists such as Bentham, and Adam Smith, who looked upon all laws for the regulation of the rate of interest as economically unsound, began to exert great and increasing influence on public opinion, so that in 1854 the Imperial Parliament passed an Act repealing all usury laws, whether based on common law or statute. The example set by the mother country was followed in 1858 by the Canadian Parliament, which in that year passed the law which now stands in the statute book as R.S.C., c. 127, s. 1, a trenchant and far-reaching enactment which it may be well to quote here in full: "Except as otherwise provided by this or any other Act of the Parliament of Canada, any person may stipulate for, allow and exact on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon."

The law thus laid down with such emphatic clearness has practically remained in force during the period of nearly half a century that has elapsed since its enactment, until the present year, when it has received a rude shock by the passing of the important Act which is the subject of this article. We have thought it right therefore to call the attention of our readers to a statute which seems to deserve careful consideration, both from

its positive effect, in itself, and as an indication that in matters of this kind, as in so many others, "the whirligig of time brings in his revenges," and that there is a strong disposition to revert to principles and methods which were thought to have received their quietus fifty years ago.

The Money-Lenders Act has only been in force for a few months and it may be found useful to give an outline of its main provisions. The preamble, after reciting the undoubted fact that "on the part of some money-lenders a practice has obtained of charging exorbitant rates of interest to needy or ignorant borrowers," goes on to state that it is in the public interest that their "transactions should be controlled by limiting their rates of interest." After a definition of the expression "money-lender" as used in the Act, which is based, though with important variations, upon that given in the Imperial Money-Lenders Act, 1900, to the bearing of which upon our subject, reference will hereafter be made, we have the main gist of the Act in the third section, which in view of its importance we quote in full: "Notwithstanding the provisions of c. 127 of the Revised Statutes no money-lender shall stipulate for, allow or exact on any negotiable instrument, contract or agreement, concerning a loan of money, the principal of which is under five hundred dollars, a rate of interest or discount greater than twelve per cent. per annum; and the said rate of interest shall be reduced to the rate of five per cent. per annum from the date of judgment in any suit, action or other proceeding for the recovery of the amount due." Subsequent sections contain provisions giving ample powers to the Court whereby it may inquire into and re-open transactions of the kind aimed at, and making an important exception in favour of the bona-fide holder, before maturity, of a negotiable instrument discounted by a preceding holder at a rate of interest exceeding that authorized by the Act. There is also a formidable section, rendering the money-lender who transgresses the Act liable to criminal penalties, while some slight consolation for his woes may be found in the concluding sections which provide that the Act shall not apply where the

whole interest charged does not exceed fifty cents, and point the way to a new El Dorado in the Yukon Territory, which is expressly exempted from its operation.

Reference to the discussion which took place when the bill, which is now embodied in this Act, was before the House of Commons, will shew that there was a great difference of opinion amongst the members, not so much as to the desirability in a general way of the object aimed at, but rather as to the possibility of attaining it in the way proposed. We fancy that most, if not all, of our readers will endorse without hesitation the views expressed by the present Minister of Justice in clear-cut language which it is a pleasure to reproduce in our columns: "I may say—speaking only for myself alone—that I have very great doubt whether any legislation can ever be effective against the evils of usury. The endeavour to fix by statute the rate of interest which the borrower shall pay to the lender seems to me not different in principle from endeavouring to fix by statute the price which the purchaser shall pay the seller for a bushel of wheat or any other commodity. I have no doubt that in whatever way we shall endeavour to legislate against this evil, we shall find in practice, crafty and scheming men endeavouring to find means for circumventing the provisions of the law and, possibly, only too well succeeding," .

Mr. Aylesworth who had charge of the bill for the Government, after stating his own opinion as above, went on to say that the subject was one "in regard to which some effort must be made," and claimed that the attempt had been made to accomplish the purpose desired by following to a great extent, the provisions, and even the very language, of the English Money-Lenders Act of 1900." A comparison of the two Acts will shew the great resemblance, and even in many cases, identity of expression, for which credit was thus claimed, but we think one important element in the case was overlooked by those who discussed the question—the fact, namely, that the principles underlying these two Acts are radically different, and that therefore the use of the same, or similar language in both, may to a

certain extent, tend rather to mislead than to guide those who are hereafter called upon to interpret the Canadian Statute. The Canadian Act is avowedly and unmistakably a reenactment pro tanto of the old usury laws by which the rate of interest on money lent was expressly limited to a certain percentage—it is in fact, so far as it goes, a repeal of the Act of 1858 which is embodied in the first section of R.S.C., c. 127, to which reference has been made. The English Act on the other hand is in no respect to be looked upon as a re-enactment of the old usury laws which were repealed in 1854. It does not attempt to say what shall be the maximum rate of interest in any particular case, but applies in a general way to any case in which the Court is satisfied that excessive interest has been charged, and that the "transaction is harsh and unconscionable, or is otherwise such that a Court of equity would give relief." The true meaning and construction of this Act has recently received a very full and careful discussion in the case of *Carringtons Limited* v. *Smith* (1906), 1 K.B. 79, and in this connection one or two quotations from the judgment of Channell, J., may be found useful, as shewing what is the real scope of the English law with respect to usurious transactions. In speaking of the difficulty found in deciding what would be an "excessive" rate of interest under the Act, he says: "Interest is nothing but the sum to be paid for the use of money for a certain time, and the value of a loan of money, as of everything else, is what it will fetch. The usury laws have been done away with, and the Legislature seems to have intentionally avoided re-enacting them and telling us what is to be the maximum of lawful interest."

What then is the criterion applied in the English Courts to cases in which relief is sought under under the provisions of their Act? This question, as pointed out in the judgment referred to, is by no means free from difficulty, and it is perhaps scarcely possible at present to harmonize all the decisions that have been given on the various points involved. The general principle, however, seems to be stated with sufficient clearness in the following quotation. "Whenever the borrower is in such

a state that his agreement cannot be taken as a test of what is reasonable—when he is ignorant, when advantage is taken of him, or when his necessities are such that he practically has no free-will, there is no difficulty in applying the Act, and judges are not likely to hesitate to apply it."

Enough we think has been said to shew that the leading principle of such an Act differs toto coelo from that of the Canadian Act, which recognizes no rule having any moral or intellectual value, unless indeed it can be contended that economic laws may safely be disregarded as regards transactions involving sums under five hundred dollars, and exceeding fifty cents! For this reason we do not think that our counsel and judges will derive much benefit from English cases, turning as they do upon considerations altogether different from those which will arise in the construction of the Canadian Act.

The object of the Act is, as we have said, in itself a worthy one, and every good citizen must sympathize with the desire to throw the law's protection around the weak and inexperienced victim of rapacity and oppression. But there is only too much reason to fear that little, if any relief, can be expected from a measure which attempts to regulate by a mere arbitrary standard the maximum rate of interest which any sum of money under five hundred dollars should bear, while beyond that magic boundary, borrower and lender may deal freely as before. Means will in all probability be found to evade its provisions on one hand, while on the other, it will bear hardly on intending borrowers of full age and competent understanding who are quite as able to understand and make a bargain as any money-lender that ever lived. It is to be hoped that the Minister of Justice will at some future session of Parliament, employ his keen intellect and his well-known power of clear and accurate expression in devising some better remedy for the evils of usuary than the Act of 1906, which as we have pointed out does not appear to enjoy any large measure of his personal approval.

Since the above article was written, the writer's attention has been called to the judgment of the House of Lords in

Samuel v. *Newbold*, 22 T.L.R. 703. This case is more recent, and, of course, of greater authority than *Carringtons, Limited* v. *Smith*, but it does not seem to alter the conclusions there arrived at to any material extent. No one would have objected if our Canadian Act had laid down the principle stated in the head-note to *Samuel* v. *Newbold*, that "the rate of interest charged upon a loan may be so excessive as of itself, if unexplained, to shew that the transaction is harsh and unconscionable."

GOODWIN GIBSON.

SUGGESTED AMENDMENT TO THE ELECTION LAW.

In the *Weekly Sun*, of Dec. 5, the "Bystander" has commented briefly upon the suggestion recently made in this Journal, that the time has come when it is expedient to convert into a specific statutory offence the attempt to influence constituencies as a whole, either by the present expenditure of public money, or by declarations, whether promises or threats, with respect to the future expenditure of such money.

The writer of the article in which that suggestion was made regrets that the opinion or his critic regarding the utility of the proposed legislation is distinctly unfavourable; and his regret is increased by the fact that this unfavourable opinion, having been expressed in a newspaper widely circulated among farmers, will find its way to that very section of the community which, as it derives the least benefit from the application of the funds of the state to those objects which most commonly furnish the opportunities and means for that particular form of corruption against which the proposed enactment would be directed, might reasonably be expected, merely on the ground of self-interest, to be the warmest supporters of such legislation.

The broad ground upon which the "Bystander" takes exception to the suggested addition to the statute books is that, "if people are willing to be corrupted, corrupted in some form they will be," a proposition from which he draws the pessimistic and uncomfortable inference, that it is not worth while to close

a single avenue of corruption, as long as this unamiable characteristic renders it certain that others will presently be opened. It needs but little consideration, however, to perceive that, if this argument had always been deemed valid and carried to its logical conclusions in all departments of legislation, many existing enactments which are commonly believed to be beneficial, would never have been adopted. At different times "strict statutes and most biting laws" have been passed for the purpose of curbing various evil propensities not less deeply ingrained in human nature than that which is emphasized by our critic. If it is useless to supplement the laws against bribery by provision calculated to check new forms of corruption, according as their mischievous operation and effects may become apparent, than by parity of reasoning it must have been lost labour to produce those numerous enactments by means of which legislatures have sought to protect societies against the novel and more refined forms of fraud. peculation and roguery by which a certain portion of the community is constantly endeavouring to gratify the predatory instincts derived from the period when men were content with

> the good old law, . . the simple plan,
> That they should take who have the power,
> And they should keep who can.

A conspicuous and pertinent example of such enactments is furnished by those which are directed against various kinds of sharp practice by promoters and officials of companies. It is, of course, true enough that even the shrewdest of business men not infrequently makes the unpleasant discovery, that, while carrying on some complex operation of "high finance," he has placed himself in a predicament in which the criminality of his acts is as obvious with reference to extremely elementary principles as was the civil liability of certain parties in a notable case in which that singularly clear-sighted judge, Sir George Jessel, after listening to lengthy arguments, fortified by numerous precedents, remarked that the only authority which he deemed it necessary to cite for the purpose of sustaining his decision was

the commandment, "Thou shalt not steal." But it cannot seriously be questioned, that some of the most harmful of the forms which dishonesty assumes with a Protean elusiveness in the modern business world could not be punished at all, if they had not been made the subject of definite statutory provisions. That the legislatures have not only not wasted their time in elaborating such enactments, but that they would have been derelict in their duty to the public, if they had not strengthened the hands of justice in this manner has never been doubted.

The analogy between new kinds of dishonesty in business and new kinds of political corruption seems in the present point of view to be sufficiently close to warrant the conclusion that, if the former class of offences can be effectually checked only by means of special legislation, which is therefore desirable, similar legislation for the purpose of checking the latter class of offences is neither inexpedient nor useless. The general principle of legislative policy in this connection may, it is conceived, be stated in some such form as this: Whenever a new description of immoral or dishonest conduct developes itself in a community, and it is either indisputably outside the purview of existing statutes, or not clearly within their scope, an occasion arises for the enactment of additional provisions. That form of political corruption with which we are here concerned is, so far as regards Canada, manifestly one of those which are not covered by any of the laws now in force, and if it is to be suppressed at all, must be defined and prohibited by a new statute. With all deference the author of the article in question confesses that the consideration upon which his critic relies still seems to him a wholly inadequate reason for refusing to legislate on the lines proposed. From the view of the "Bystander," that, until the standard of political morality is raised among voters themselves, it is vain to expect a total cessation of bribery in one shape or another, no one is likely to dissent. But, as already pointed out, unless analogy is to be entirely disregarded, it cannot successfully be contended that the impossibility of stamping out that offence altogether, until new ethical standards are recognized, is a suffi-

cient ground for declining to deal immediately with one of its forms which is already producing an abundant harvest of deplorable consequences, and which threatens to cause far greater evils in the future. The mere fact that the proposed law would, if honestly and unflinchingly administered, go far towards depriving the party which happens to be predominant of the opportunity of influencing voters at the expense of the community at large, is quite sufficient, as it would seem, to recommend that law to favourable consideration. If, as our critic states, and perhaps truly, political corruption is to continue for an indefinite period, the taxpayers would gain something, if corrupt politicians were at least compelled to supply the materials of bribery at their own expense. It is a preposterous situation that they should be allowed to manipulate the public money in a manner which, though technically legal, is essentially inconsistent with the primary and fundamental obligation of legislators and ministers to use that money impartially for the benefit of the whole community. Finally it may be observed that a distinct and noteworthy advantage of the suggested statute is that, as the acts to be prohibited could, in the very nature of the case, only be committed under circumstances which would render it extremely easy to obtain the evidence required to convict the offender, the deterrent effect of such an enactment would in all probability be much greater than that of any of those which are directed merely against the corruption of individual voters.

C. B. LABATT.

LOCAL MASTERS OF TITLE.

It has been customary in times past to appoint men without any previous legal training to be registrars of deeds in Ontario. On the whole we believe no serious difficulty has arisen from the practice; but we do think that if the present government of that province should unhappily adopt the same principle in making

appointments to the office of the Master of Titles, or Local Masters of Title, it would be undertaking risks which it is not justified in the public interest in assuming.

A registrar of deeds, if he possesses ordinary intelligence and is systematic and painstaking in the conduct of his office, may possibly carry on the business of his office without mishap, notwithstanding his want of knowledge of law; but a Master of Titles who has to administer the Torrens system of land transfer has a very different system to deal with, he is not merely a custodian of such deeds as may be tendered him for registration, but he has to pass on their legal sufficiency, and he is often called on in a quasi judicial character to consider documents presented to him for registration and questions arising thereon for which an accurate knowledge of law is indispensable. Mistakes by such a functionary may cause at any time heavy drafts on the Assurance Fund, and in case of that being exhausted, on the Provincial Exchequer. To appoint to such offices men without any legal training is to court disaster.

Quite apart from the very important consideration above referred to, one is at loss to know why the claims of professional men to positions which should, for the safety and convenience of the public, be filled by lawyers, have been ignored in the past, notably so by the late government in Ontario. One fails to see why a baker should be elected to superintend the important work connected with the granting of letters of administration, the proof of wills and such like as Registrar of a Surrogate Court, or farmers, grocers, or blacksmiths be chosen as Clerks of County Courts to decide on points of practice and tax costs, etc., with which matters they are totally unfamiliar. But the comical aspect of such appointments is not the most striking. If fairness to the legal profession is to be set aside surely the requirements of public business should not be overlooked. In all the matters above referred to legal training is not merely desirable, but it is essential to the proper discharge of the duties imposed.

REVIEW OF CURRENT ENGLISH CASES.

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FATAL ACCIDENTS ACT, 1846 (9 & 10 VICT. c. 93)—(R.S.O. 3. 166) —NEGLIGENCE CAUSING DEATH OF CHILD—LOSS OF SERVICE—BURIAL EXPENSES—PARENT AND CHILD.

Clark v. *London General Omnibus Co.* (1906) 2 K.B. 648 was a case involving the sum of £14, but like a good many other cases where a trivial amount was in question, the point of law on which it turned is both difficult and interesting. The facts were quite simple. The plaintiff and his daughter were riding on their bicycles. Through the negligence of the defendants' servants they were knocked over by one of the defendants' omnibuses, the daughter was killed and the bicycles wrecked. The action was brought under the Fatal Accidents Act and also under the common law by the father, and the only question on the appeal was whether he was entitled to recover for the funeral expenses of his daughter, who was under age. He had also claimed to recover for loss of his daughter's services, but that claim had been disallowed at the trial. But really his right to recover for the funeral expenses, turned upon precisely the same principle as his right to recover for services; and that is the principle on which damages in such cases are to be assessed. It is quite obvious that if the damages are to be assessed upon the principle that they are to be for the injury the deceased himself sustained, then as he sustained no loss of service, or any expenses of his funeral, such damages are not recoverable. On the other hand, who can estimate the damage to the deceased for loss of *life*? One might think that though the plaintiff in such an action cannot put forward a claim of that kind as a ground of recovery, yet he may indirectly do so when it comes to a question of apportioning the damages which are recoverable as damages to the deceased. The Act says the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties for whose benefit the action is brought. The Court of Appeal (Lord Alverstone, C.J., Barnes, P.P.D., and Farwell, L.J.) decided, however, that the funeral expenses of the deceased are not recoverable in such actions.

INSURANCE—POLICY ON TRANSIT OF GOODS—"ALL RISKS BY LAND AND BY WATER"—CONSTRUCTION OF POLICY—DAMAGE BY INSECTS.

Schloss v. *Stevens* (1906) 2 K.B. 665 was an action on an insurance policy which covered "all risks by land and by water" during the transit of the goods in question; during the transit by abnormal delay, which necessarily involved the exposure of the goods, 12 bales were damaged by damp, one bale was damaged by wetting, and another by accidental wetting and injury by worms. It was contended for the defendants that the poilcy covered none of the damage thus occasioned, but only such risks as are ordinarily incurred in the transit of goods on a voyage by sea or land, and that all goods were in such cases more or less exposed to dampness, which was an ordinary incident of transit, and that risk was not covered by the policy. Walton, J., however, was of the opinion that the words "all risks" must be literally construed, and included inter alia those which caused the damage complained of.

HUSBAND AND WIFE—PRINCIPAL AND AGENT—GOODS SUPPLIED ON ORDER OF WIFE—JUDGMENT AGAINST WIFE FOR PART OF ENTIRE PRICE—ELECTION NOT TO SUE HUSBAND FOR BALANCE.

In *French* v. *Howie* (1906) 2 K.B. 674 the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) have agreed with the dissenting opinion of Jelf, J., in the Court below and have reversed the judgment of the Divisional Court (1905) 2 K.B. 580 (noted ante, vol. 41, p. 832). The action was against husband and wife for the price of goods supplied on the order of the wife; the goods were furnished at one entire price of £26 11/6, for groceries. The wife admitted liability for £24; £20 was paid in the course of the proceedings and judgment given against her for £4, and the plaintiff was given liberty to proceed against the husband for the balance. At the trial it was found that there was no joint liability, but that the husband alone was liable, and judgment was given against him, and the Divisional Court refused to disturb it, holding that the plaintiff's taking judgment against the wife for part of an entire debt did not amount to an election not to sue the husband for the balance. This the Court of Appeal hold was erroneous and that the case was governed by *Morel* v. *Westmoreland* (1904) A.C. 11 (noted ante, vol. 40, p. 233).

CHEQUE—FORGED INDORSEMENT—PAYEE—FICTITIOUS PERSON——BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT. C. 61) S. 7 (3)—(53 VICT. C. 33, S. 7 (3) (D.)).

In *Macbeth* v. *North & South Wales Bank* (1906) 2 K.B. 718 the plaintiff sued for damages for conversion of a cheque, or alternatively for money had and received by the defendants to his use. The facts were that one White had falsely represented to the plaintiff that he had agreed to buy 5,000 shares from a man named Kerr at £2 5s. per share, and had arranged to re-sell the shares for £2 10s. a share, and induced the plaintiff, in order to enable him to finance the transaction, to give him a cheque for £11,250 payable to Kerr, in order that he might deliver it to Kerr in exchange for the shares. White fraudulently forged Kerr's name to the indorsement of the cheque and paid it into his own account with the defendant's bank. No transfer of shares was ever made by Kerr to White. The defendants having cashed the cheque in the due course of business claimed that they were protected, because, in the circumstances, "Kerr," the payee named in the cheque, must be deemed to have been a fictitious payee within the Bill of Exchange Act, s. 7 (3), but Bray, J., held that that contention was not tenable, that Kerr was in fact a veritable person for whom the plaintiff intended the cheque and therefore the forgery of his name gave the defendants no title. It may be mentioned that, in furtherance of his fraud, White had in fact by forged transfers purported to transfer 5,000 shares of the kind contemplated to the plaintiff, which the plaintiff had at first accepted, but immediately repudiated on discovering the fraud, and this circumstance was held not to affect the plaintiff's rights.

CONTRACT—MASTER AND SERVANT—PIECE WORK—CONTRACT NOT TO DISMISS FROM SERVICE WITHOUT MONTH'S NOTICE—IMPLIED OBLIGATION TO PROVIDE WORK.

Devonald v. *Rosser* (1906) 2 K.B. 728 was an action by a workman against his employer. By the contract of employment the plaintiff was employed to do piece work, and it was stipulated that he should not be dismissed from his employment without a month's notice. Owing to the state of trade the defendants found it impossible to keep their works running at a profit, and therefore closed them, and gave the plaintiff a month's notice

to quit. No work being provided for him during the month the plaintiff claimed to recover damages for breach of an implied obligation on the defendants' part to supply him with work during the continuance of his employment. Jelf, J., who tried the case, after a careful review of the authorities came to the conclusion that the plaintiff was entitled to succeed, and fixed the damages at a sum equal to the average wages earned by the plaintiff in a month when actively employed, and the Court of Appeal (Lord Alverstone, C.J., Barnes, P.P.D., and Farwell, L.J.) affirmed his decision.

EASEMENT—ANCIENT LIGHT—ACQUISITION OF EASEMENT OF LIGHT BY TENANT—SERVIENT AND DOMINANT TENEMENTS HELD UNDER SAME LESSOR—SURRENDER OF LEASE—NEW LEASE.

Fear v. *Morgan* (1906) 2 Ch. 406 involved a difficult question as to the law of Easements. The facts were these. Two tenements, Nos. 16 and 18, owned by the same lessors, were leased to different tenants. Tenant of 16 acquired an easement of light as against the tenant of 18, by reason of twenty years enjoyment. Tenant of 16 surrendered his lease and took a new lease of his premises, nothing being said about the lights in the new lease. Subsequently the tenant of 18 also surrendered and took a new lease of the premises subject to a condition imposed by the lessors that he should make an erection on his premises, which would have the effect of destroying or obstructing the ancient lights of No. 16, the plaintiff's premises. In these circumstances Kekewich, J., held, and the Court of Appeal (Williams, Romer and Moulton, L.JJ.) confirmed his decision, that it was competent for a lessee under the Prescription Act, 1832 (2 & 3 Wm. IV. c. 71), s. 3, to acquire an easement of light both as against an adjoining lessee and as against his lessor, even though the reversion of both the servient and dominant premises was in the same lessor; and that such right was not lost by a surrender of the dominant tenement and taking a new lease thereof in the absence of anything in the new lease to shew that such easement was not intended to be granted. Moulton, L.J., points out that upon the surrender of No. 16 it would have been competent for the lessors in granting the new lease to have put an end to the easement, but in this case he holds they did not.

PARTNERSHIP—DISSOLUTION—DEATH OF PARTNER—PARTNERSHIP BUSINESS CARRIED ON BY SURVIVING PARTNER—SURVIVING PARTNER—WINDING UP OF PARTNERSHIP—PLEDGE OF ASSETS BY SURVIVING PARTNER.

In re Bourne, Bourne v. *Bourne* (1906) 2 Ch. 427 was an administration action, in which a question arose as to the validity of a mortgage of real estate made by a surviving partner in the following circumstances. At the time of the dissolution of the partnership in question by the death of one of the partners, the partnership banking account was overdrawn and remained overdrawn until the final winding-up of the business, and the mortgage in question was given by the surviving partner on certain partnership real estate to secure the overdraft. Certain creditors of the deceased partner contested its validity, and priority as against the lien of the deceased partner's executors on the surplus assets for his share, but Farwell, J., held that the surviving partner had power to make the mortgage, and in the absence of evidence to the contrary the bank were entitled to assume that the dealings with the account were for the purpose of winding-up the partnership, and therefore the mortgage was entitled to priority over any lien of the executors of the deceased partner.

COMPANY—COSTS OF MEMORANDUM OF ASSOCIATION—PRELIMINARY EXPENSES—REGISTRATION—LIABILITY OF COMPANY.

In re English & Colonial Produce Co. (1906) 2 Ch. 435. A solicitor had been employed by the promoters of a company and who afterwards became its directors, to draw the memorandum of the association and also to register it, he now claimed to recover against the company the costs so incurred. As regards the costs of the memorandum it was held by Buckley, J., and the Court of Appeal (Williams, Romer, and Moulton, L.JJ.), that the company was not liable, and as to the fees for registration Buckley, J., held, and on this point there was no appeal, that inasmuch as the company was under a statutory obligation to register the memorandum, that the expenses thereof might be recovered from the company. The fact that a company adopts and takes the benefit of services rendered under a contract entered into before its formation, does not in the opinion of the Court of Appeal impose any equitable obligation on the com-

pany to pay for such services; and a dictum of the Court of Appeal *In re Hereford & S. W. E. Co.* (1876) 2 Ch. 621, 624, to the contrary was disapproved.

PATENT—INFRINGEMENT—CONDITION AS TO SALE OF PATENTED ARTICLE—PURCHASER WITHOUT NOTICE OF CONDITION.

Badische Analin und Soda Fabrik v. *Isler* (1906) 2 Ch. 443. This was an action to restrain the alleged infringement of a patent. The plaintiffs alleged that the defendant had bought the patented article from the plaintiffs' licensees with knowledge that the license was restricted by a condition binding the licensees to sell to consumers only, and not to dealers; and that the defendant was a dealer. The only restriction on sale by the licensees proved, was that contained in a label attached to the tins in which the patented article was sold, and these conditions, as the Court found, implied that the purchasers of unopened tins might re-sell them, and as the defendant had bought in that way it was held that he had not infringed. The judgment of Buckley, J., was therefore affirmed by the Court of Appeal (Williams, Romer and Cozens-Hardy, L.JJ.).

GENERAL BEQUEST OF PERSONALTY—POWER TO CREATE CHARGE ON LAND—WILLS ACT, 1837 (1 VICT. C. 26) S. 27—(R.S.O. C. 128, S. 29).

In re Slavin, Marshall v. *Wolseley* (1906) 2 Ch. 458 is a case in which the provisions of s. 27 of the Wills Act (R.S.O. c. 128, s. 29) were sought to be applied. By that section it is provided that a general bequest of personal estate shall be held to pass the personal estate which the testator may have power to appoint in any manner he thinks fit, and shall operate as an execution of the power unless a contrary intention appears by the will. In this case the testator had power to charge real estate, of which he was only tenant for life, with a sum or sums not exceeding in the aggregate £6,000. He made his will whereby he gave all his real property to one person and all his personal property to another. He did not execute the power or refer to it in his will. The legatees of the personalty claimed that under the statute the general bequest of the testator's personalty operated as an execution of the power in their favour, and that they were

therefore entitled to the £6,000 by way of charge, but Buckley, J., held that the statute did not apply. According to his view the section contemplates the existence of some fund or property in existence which is the subject of a general power of appointment by the testator and at his uncontrolled disposition, although not his property; but it does not extend to a power to impose an otherwise non-existing charge which when created would be personalty and at his absolute disposition.

COMPANY—INSOLVENCY—FRAUDULENT PREFERENCE—DELAY IN GIVING SECURITY UNTIL INSOLVENCY.

In re Jackson & Bassford (1906) 2 Ch. 467 was a winding-up proceeding in which a debenture covering all the assets of the company had been handed to one of the directors in the following circumstances. In December, 1904, the company asked for an overdraft from its bankers. The bank required the guaranty of William Jackson, one of the directors, and by a resolution of the Board of Directors he was authorized to arrange with the bank for the overdraft and it was also resolved that the company should "whenever called upon by him" so to do, give him security by debentures or other charge for the amount for which he should so become liable. The overdraft was obtained and Jackson deposited securities of his own with the bank to secure it. In February, 1905, the overdraft was increased, a similar resolution being passed. Neither agreement was registered. On 8th December, 1905, Jackson claimed his debenture, which was accordingly given him. On 29th December, 1905, the directors resolved to call a meeting of shareholders to pass a resolution for the winding-up of the company. Buckley, J., was of the opinion that as the giving of the debenture was purposely delayed until the company was insolvent, in order to prevent its credit being impaired which would result from the registration of the debenture, the transaction amounted to a fraudulent preference and could not stand.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Yukon.] [Oct. 11, 1906.

RUTLEDGE *v.* UNITED STATES SAVINGS AND LOAN CO.

Cause of action—Limitation of actions—Contract—Foreign judgment—Statute of James—Statute of Anne—Lexi fori—Lexi loci—Absence of debtor.

Under the provisions of the Yukon Ordinance, c. 31 of 1890, the right to recover simple contract debts in the Territorial Court of Yukon Territory is absolutely barred after the expiration of six years from the date when the cause of action arose, notwithstanding the debtor has not been for that period resident within the jurisdiction of the Court.

Judgment appealed from reversed. GIROUARD and DAVIES, JJ., dissenting.

Ewart, K.C., for appellant. *Chrysler,* K.C., for respondents.

Quebec.] [Oct. 17, 1906.

ATTORNEY-GENERAL OF QUEBEC *v.* FRASER.

Rivers and streams—Navigable and floatable waters—Obstructions to navigation—Crown lands—Letters patent of grant—Evidence—Collateral circumstances leading to grant—Title to land—Riparian rights—Fisheries.

A river is navigable, when with the assistance of the tide it can be navigated in a practicable and profitable manner, notwithstanding that at low tides it may be impossible for vessels to enter the river on account of the shallowness of the water at its mouth. *Bell* v. *Corporation of Quebec,* 5 App. Cas. 84, followed.

Evidence of the circumstances and correspondence leading to grants by the Crown of lands on the banks of a navigable river cannot be admitted for the purpose of shewing an intention to

enlarge the terms of letters patent of grant of the lands, subsequently issued, so as to include the bed of the river and the right of fishing therein.

The judgment appealed from (Q.R. 14 K.B. 115) was restored. *Steadman* v. *Robertson*, 18 N.B.R. 580, and *The Queen* v. *Robertson*, 6 S.C.R. 52, referred to; *In re Provincial Fisheries*, 26 S.C.R. 444, (1898) A.C. 700, discussed.

Stuart, K.C., and *Lafleur*, K.C., for appellant. *Flynn*, K.C., for respondents.

Quebec.] TANGUAY *v.* PRICE. [Nov. 15, 1906.

Floatable river — Boom — Logs from up river — Retention — Freshet salvage.

P. owned a saw-mill on the bank of a floatable river and placed a boom across the stream to hold logs floated down to the mill. T. had a boom further up-stream in which he had stored pulp-wood. An unusual freshet broke T.'s boom and brought a quantity of his pulp-wood down with the current into P.'s boom, where it was caught and held until removed some time afterwards by T.'s men without causing any damage or expense to P. In an action by P. to recover salvage or the value of the use of his boom for the time during which T.'s logs had been held therein,

Held, that as P. had no right of property in the river where he had placed the boom in which T.'s wood had been caught, those waters remained publici juris, notwithstanding the construction of the barrier; that T.'s wood came to the boom and remained there in a lawful manner; that the service rendered in stopping the pulp-wood was involuntary and accidental, and that P. could recover nothing therefor.

Per FITZPATRICK, C.J.:—There is no difference between the laws of the Province of Quebec and those of England in respect to the rights of riparian owners to the water of floatable streams flowing past their lands. *Miner* v. *Gilmour*, 12 Moo. P.C. 131, referred to.

Appeal allowed with costs.

Belcourt, K.C., and *Turcotte*, K.C., for appellant. *Stuart*, K.C., and *Bender*, K.C., for respondent.

Ex. Ct.] [Nov. 15, 1906.

HATTON *v.* COPELAND-CHATTERSON CO.

Patent of invention—Infringement of patent—Sale for a reasonable price—Use of patented device—Contract—Evidence.

The patentee of a device for binding loose sheets sold the defendant H. binders subject to the condition that they should be used only in connection with sheets supplied by or under the authority of the patentee. H. used the binders with sheets obtained from the other defendants contrary to the condition. In an action for infringement of the patent,

Held, that the condition in the contract with H. imposing the restriction upon the manner in which he should use the binders was not a contravention of the provisions of s. 37 of the Patent Act, R.S.C. c. 61, in respect to supplying the patented invention at a reasonable price to persons desiring to use it, and that the use so made of the binders by H. was in breach of the condition of the contract licensing him to make use of the patented device and an infringement of the patent.

Judgment appealed from (10 Ex. C.R. 224) affirmed.

Mignault, K.C., and *Perron*, K.C., for appellant. *Raney*, for respondent.

Ont.] [Nov. 22, 1906.

CANADIAN CARRIAGE CO. *v.* LEA.

Appeal—Jurisdiction—New trial—Discretion—Ontario appeals—60-61 Vict. c. 34.

Per FITZPATRICK, C.J.:—Sec. 27 of R.S.C. c. 135 prohibits an appeal from a judgment granting, in the exercise of judicial discretion, a new trial in the action.

Per DAVIES, J.:—Under the rule in *Town of Aurora* v. *Village of Markham*, no appeal lies from a judgment of the Court of Appeal for Ontario on motion for a new trial, unless it comes within the cases mentioned in 60-61 Vict. c. 34, or special leave to appeal has been obtained.

Appeal from judgment of the Court of Appeal (11 O.L.R. 171) quashed.

Lynch-Staunton, K.C., for appellants. *Shepley*, K.C., for respondents.

Ont.] [Nov. 22, 1906.

GLOSTER *v.* TORONTO ELECTRIC LIGHT CO.

Negligence—Electric Light Co.—Wires on public highway—Proximity to bridge—Injury to child—Dedication.

Several years ago the owner of land in the Township of York built a bridge over a ravine for access to and from the City of Toronto, and about 1894 the Toronto Electric Light Co. placed wires across the ravine about ten feet from the bridge. In 1904 the bridge was reconstructed and made wider, being brought to within from 14 to 20 inches of the wires which had become worn and ceased to be insulated. A boy under nine years of age, while playing on the new bridge, put his arm through the railing and his hand touching the wire he was badly injured.

Held, that the plans and deeds in evidence shewed a dedication as a public highway of the bridge and land on each side of it, and such highway included the land over which the wires passed.

Held, also, that the wires in the condition in which they were at the time of the accident were dangerous to those using the highway and the company were liable for the injury to the boy.

Appeal allowed with costs.

Millar and *D. J. McDougal*, for appellants. *Hellmuth*, K.C., and *G. L. Smith*, for respondents.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [Nov. 13, 1906.

RE PORT ARTHUR AND RAINY RIVER PROVINCIAL ELECTION.
PRESTON *v.* KENNEDY.

Parliamentary elections—Controverted election—Scrutiny—Ruling of trial judge as to disqualification of class of voters—Appeal to Court of Appeal—Jurisdiction—Finality of voters' lists.

Upon proceeding with the scrutiny consequent upon the judgment of the Court of Appeal (ante, pp. 685, 720), TEETZEL, J.,

one of the judges who tried the petition, made a general ruling to the effect that in cases of objection to votes on the ground that the persons who voted were under the age of twenty-one years or were aliens, although their names were on the voters' lists, he would receive evidence to shew minority or alienage, notwithstanding the provisions of the Voters' Lists Act declaring that upon a scrutiny the voters' lists shall be final and conclusive.

Held, that no appeal lay to the Court of Appeal from such ruling.

Per MEREDITH, J.A., dissenting, that an appeal was competent, and should be entertained and allowed and the ruling reversed.

Hellmuth, K.C., and *W. J. Elliott,* for petitioner, appellant. *Mowat,* K.C., for respondent.

Full Court.] REX *v.* BURR. [Dec. 1, 1906.

Criminal law—Illicit intercourse with girl under sixteen—Corroborative evidence—New trial.

Criminal case reserved.

The requirements of s. 684 of the Criminal Code—which provides, inter alia, that a person accused of seducing and having illict connection with a girl of previously chaste character, above the age of 14 years and under the age of 16 years, is not to be convicted upon the evidence of one witness unless such witness is corroborated, in some material particular, by evidence implicating the accused—are satisfied if there be other testimony to facts from which the jury, or other tribunal trying the case, weighing them in connection with the testimony of the one witness, may reasonably conclude that the accused committed the act with which he is charged.

Such other testimony being found in this case, a new trial was directed under s. 746 of the Code, that being the proper alternative to adopt under that section under such circumstances as in this case, more especially as the Crown was appealing.

J. R. Cartwright, K.C., for the Crown. *O. L. Lewis,* for the prisoner.

HIGH COURT OF JUSTICE.

Divisional Court.] [Oct. 12, 1906.

LEBU *v.* GRAND TRUNK RY. CO.

Railway—Animal killed on track—Escape to highway from enclosure—Open gate from highway to track—Negligence—Liability.

Sec. 237, sub-s. 4 of the Dominion Railway Act, 1903, provides that if an animal at large upon the highway gets upon the property of the railway company and is killed, the owner may recover the amount of his loss from the company, unless it be proved that the animal got at large through the owner's negligence.

Where, therefore, the plaintiff's horse escaped, without any negligence on his part, from a pasture field adjoining the railway, and got upon the highway, and then going a short distance, passed through an open gateway into the defendants' freight yards and then on to the track where it was killed by a passing train,

Held, that the defendants were liable to the plaintiff for the loss he had sustained.

Lewis (Chatham), for plaintiff. *W. Nesbitt*, K.C., and *Frank McCarthy*, for defendants.

Falconbridge, C.J.K.B., Britton, J., Mabee, J.] [Oct. 23, 1906.

RE BELL AND THE CORPORATION OF THE TOWNSHIP OF ELMIRA.

By-law—Omission of essential part—Quashing—Con. Mun. Act, 1903 (O.)—Secs. 204, 341 and 342.

The omission in a local option by-law of the time and place where the votes are to be summed up as provided for by ss. 341 and 342 of the Con. Mun. Act, 1903 (O.), is the omission of an essential part of the by-law and s. 204 of the Act does not apply as such omission is more than an irregularity.

Judgment of ANGLIN, J., reversed.

Haverson, K.C., for the motion. *H. B. Morphy*, contra.

Divisional Court.] [Oct. 30, 1906.

LONDON AND WESTERN TRUST COMPANY *v.* LUSCOMBE.

Practice—Payment of dividends out of capital—Action by liquidator against directors—Claim of relief over against shareholders—Application to be added as third parties—Rule 200—Scope of.

In an action by the liquidator of an insolvent company against the directors, specifying several alleged illegal acts, amongst which was that of payment against dividends out of capital, the Master in Chambers, at the instance of two of the defendants, who claimed indemnity over against the shareholders for any amounts so paid by dividends, issued the usual third party order, under Con. Rule 200, directing that two out of a large number of shareholders should be joined as third party defendants, as a test case, but no order for their representing the class was obtained, though it was stated that if they appeared such order would be applied for by the plaintiff and the third parties. On appeal to a judge in Chambers, the order was set aside. An appeal, therefore, by the defendants to a Divisional Court was dismissed, the plaintiff undertaking that any moneys realized in the action would not be distributed without notice to the defendants and without leave therefor being obtained from the local judge.

C. S. Gibbons, for plaintiffs. *Middleton*, for defendants. *F. Aylesworth*, for third party.

Meredith, C.J. C.P., MacMahon, J.,
Anglin, J.] PETTYPIECE *v.* TURLEY. [Oct. 31, 1906.

Will—Construction—Trust—Precatory trust — Power — Execution of.

A testator whose mother owned an estate for life in a farm in which he had the reversion in fee by his will devised to her his interest in the farm "to be disposed of as she may deem most fit and proper for the best interest of my brothers and sisters." The mother after his death deeded the farm in fee simple to one of his sisters, the expressed consideration being one dollar and natural love and affection, and the deed containing no reference whatever to the will.

Held, that it was not necessary to determine whether the mother took absolutely, or whether, if she had not taken absolutely, a trust was created, or a power, inasmuch as even if a trust was created in the mother, the conveyance by the mother operated, and was intended to operate, as an execution of the trust, although the whole was granted to one daughter only.

F. E. Hodgins, K.C., for plaintiff. *Rose*, for defendants.

Mabee, J.] [Nov. 6, 1906.

RE BADEN MACHINERY COMPANY.

Costs—Company—Costs of alleged contributories payable out of assets—Deficiency of—Costs of petitioning creditor—Liquidator's costs and compensation—Priority—Abatement.

On the application of the liquidator of a company directed to be wound up an order was made by a local judge directing H. and S. to be placed on the list of contributories which was affirmed by a judge of the High Court and by the Court of Appeal, but was reversed by the Supreme Court with costs to be paid by the liquidator as well of that Court as of the prior appeals,

Held, that H. and S. were entitled to their costs out of the assets of the estate in priority to those incurred by the liquidator —the reasonableness of the liquidator's claim forming no element in the matter—but subject to such as were incurred by the liquidator in the realization of any assets, as well as a reasonable sum as compensation for his care and trouble in such realization.

Middleton, for H. and S. *J. E. Jones*, for petitioning creditor. *J. C. Haight*, for liquidator.

Britton, J.] BELL *v.* GODISON THRESHER CO. [Nov. 14, 1906.

Venue—Contract—6 Edw. VII. c. 19, s. 22 (O.)—Retroactivity.

An action was brought in the High Court by the purchasers of a machine against the sellers, for a return of money paid on the agreement of sale, damages for breach thereof, the return of the plaintiffs' promissory notes given thereunder, and cancellation of the agreement. The plaintiffs based their action upon a

new agreement which they alleged superseded the original one as to some of the terms, but, except as specified, the engine was to fulfil the terms and conditions of the original agreement. The original agreement contained a clause providing that if any action or actions arise in respect to the machine or notes or any renewals thereof, the same should be entered, tried, and finally disposed of in the Court which has its sittings where the head office of the defendants is located, *i.e.*, at Sarnia, and another clause providing that any action brought with respect to this contract or in any way connected therewith, between the parties, shall be tried at the Town of Sarnia, and the purchasers consent to have the venue in any such action changed to Sarnia.

Held, that the action did not come within either clause; but, if it did, that s. 22 of 6 Edw. VII. c. 19 (O.) applied, although the contract was made before it was enacted.

Order of the Master in Chambers refusing to change the venue to Sarnia affirmed.

Phelan, for defendants. *W. A. Boys*, for plaintiffs.

Falconbridge, C.J.K.B.] [Nov. 15, 1906.

RE SHARON AND STUART.

Will—Construction—Devise—Life estates—Remainder in fee—Estate tail—Period of distribution—Surviving wife—Title—Vendor and purchaser.

A testator devised to one of his sons, G., fifty acres of land, "to have and to hold to him, etc., *as aforesaid* and not otherwise." In an earlier part of the will he had devised lands to his other sons, "to have and to hold to each of them for and during their natural life respectively, and if they should marry, after their and such of their decease to have and to hold to their surviving wife respectively, and on the demise of their and each of their wives to have and to hold to their children respectively and their heirs forever." G. was unmarried at the date of the will and of the testator's death.

Held, that G. took an estate for life, and his widow (if he left one) an estate for life after his death, and his children the remainder in fee after her death, or if no widow, after G.'s death.

G. was not entitled to an estate tail under the rule in *Wild's* case, for that rule applies only where the gift to both parent and children is immediate, nor under the rule in *Shelley's* case.

Grant v. *Fuller* (1902) 33 S.C.R. 34, and *Chandler* v. *Gibson* (1901) 2 O.L.R. 442, followed.

Held, also, that the devise to the children of G. was a gift to a class, which would comprise all children coming into existence before the period of distribution.

G. had married and had children living and his wife had died at the time of an application under the Vendors and Purchasers Act, he having contracted to sell the land.

Held, that if he married again, his second or any future wife who survived him would be entitled to a life estate.

Title could not be made without the order of the Court.

A. H. Clarke, K.C., for both vendor and purchaser.

Mulock, C.J. Ex.D., Anglin, J., Clute, J.] [Nov. 23, 1906.

ANDERSON *v.* NOBELS EXPLOSIVE CO.

Writ of summons—Service out of jurisdiction—Rule 162(e)—Tort committed within Ontario.

It is only where the tort for which the plaintiff brings action has been "committed" within Ontario, that Con. Rule 162(*e*) entitles him to ask the Court to entertain an action against a non-resident defendant who is to be served with process abroad.

An order permitting service upon the defendants abroad was set aside where the cause of action alleged against the defendants, a company engaged in the manufacture of explosives in Scotland, was that they were negligent in allowing a fuse, which has been purchased by the plaintiff's employers, and which injured the plaintiff at a place in Ontario, to be manufactured and sold in a defective condition, the manner in which the fuse reached the plaintiff's employers not being alleged or suggested. The manufacture and sale must be deemed to have taken place in Scotland, and, although the invasion of the plaintiff's right of personal security occurred in Ontario, the tort comprises also the wrongful act or omission of the alleged tort-feasor.

Orders of the Master in Chambers and of MABEE, J., affirmed.

Phelan, for plaintiff. *W. H. Blake*, K.C., for defendants.

Cartwright, Master.] REID *v.* GOOLD. [Nov. 23,1906.

Parties—Action against guarantors of a promissory note—Dispute between makers and payee as to amount due—Adding makers as defendants.

In an action against the guarantors of a promissory note for $1,935.46 payable in a year, given by a company for machinery bought from the plaintiffs when it appeared that the company before the maturity of the note was claiming from the plaintiffs $953.68 for breaches of the contract of sale, and it was alleged that when the note was given it was agreed that the exact amount should be adjusted during the currency of the note in which the defendants paid into Court $1,195.01 as the amount justly due. A motion was made to add the company as defendants.

Held, that the interests of justice as defined by sub-s. 12 of s. 57 of the Judicature Act, require that wherever it can possibly be done without injustice or inconvenience one action should be sufficient and so multiplicity of legal proceedings avoided and as the guarantors (defendants) should not be required to pay more than what the plaintiff was entitled to recover the company was added as a party defendant.

W. T. Henderson (Brantford), for the motion. *Biggs,* K.C., contra.

Meredith, C.J.C.P., MacMahon, J., Anglin, J.] [Nov. 26, 1906.

IN RE WILSON AND TORONTO GENERAL TRUSTS CORPORATION.

Surrogate Court—Taking accounts—Jurisdiction to rescind order on account of mistake.

Held, that the Surrogate judge acting as the Surrogate Court has inherent jurisdiction to set aside an order which he has been induced to make by the fraud of a party who has obtained it, and also to set aside or vary an order which he has made by mistake, though not to correct errors which he has made in the judicial determination of any question upon which he has actually passed; thus in this case he had jurisdiction on these grounds to set aside and vacate an order made by him upon the taking of executors' accounts and to re-open the accounts and further investigate them without reference to the order made.

Held, also, that the acts of the Surrogate judge in passing

accounts of executors are those of the Court and not of the judge as persona designata.

F. E. Hodgins, K.C., and *D. T. Symons,* for appellant. *Shepley,* K.C., and *J. H. Moss,* for respondents.

Falconbridge, C.J.K.B., Britton, J., Mabee, J.] REX *v.* SPELLMAN. [Nov. 30, 1906.

Conviction—By police magistrate of city and county—Subsequent appointment of salaried police magistrate for the county—Offence committed in county outside the city limits—Jurisdiction.

On a motion to quash a conviction made by a police magistrate of a city appointed under R.S.O. 1877, c. 72, and later appointed police magistrate for the county in which the city was situate, under 41 Vict. c. 4, s. 9(O.), for an offence committed in the county outside the city limits.

Held, that notwithstanding there was a salaried police magistrate subsequently appointed for the county under 48 Vict. c. 17, s. 1 (O.); R.S.O. 1887, c. 72, s. 8, the conviction was good, although the convicting police magistrate was not acting because of the illness or absence of or at the request of the other county police magistrate.

Per BRITTON, J.:—The city police magistrate is ex-officio justice of the peace for the county, and could as police magistrate sitting alone do anything that two justices of the peace could sitting together.

Haverson, K.C., for the motion. *J. R. Cartwright,* K.C., contra.

Mulock, C.J. Ex.D., Anglin, J., Clute, J.] [Dec. 7, 1906.

FLEUTY *v.* ORR.

Negligence—Injury to person by fault of driver of vehicle in highway—Liability of owner—Relation between owner and driver—Master and servant or bailor and bailee—Inference from facts—Duty of appellate Court.

The defendant, an hotelkeeper, being the possessor of an omnibus and horses, made an agreement with M. whereby, in

consideration of M. driving the defendant's guests free to and from the railway stations, paying the defendant 70 cents a day for the board of the horses at the defendant's stables, M. should be entitled to the use of the omnibus and horses, and to take for his own use all sums which he could earn by conveying passengers other than the defendant's guests, and by carrying luggage. The plaintiff was injured upon the highway owing to the negligence of M., who was driving the omnibus empty to one of the stations to meet an incoming train.

Held, that the question whether the relation between the defendant and M. was that of master and servant or that of bailor and bailee was a question of fact, and the test was the existence of the right of control as to anything not necessarily involved in the proper performance of the work undertaken by M. for the defendant; and (CLUTE, J., dissenting), that the proper inference from the above facts and other facts in evidence (set out in the judgments) was that the relationship between the defendant and M. was that of bailor and bailee; and therefore the defendant was not responsible for the negligence of M.

Saunders v. *City of Toronto* (1899) 26 A.R. 265 followed.

There was no conflict of evidence and the trial judge drew inference from the undisputed facts.

Held, that an appellate Court was at liberty (and per ANGLIN, J., was bound) to review the inferences of the trial judge.

Judgment of the County Court of Huron reversed.

E. L. Dickinson, for defendant, appellant. *W. Proudfoot*, K.C., for plaintiff.

Meredith, C.J.C.P., MacMahon, J., Anglin, J.] [Dec. 7, 1906.

GEORGE *v.* GREEN.

Practice—Special endorsement—Nullity—Irregularity—Account stated—Interest on—Setting aside judgment—Terms.

The weight of English authority is against the proposition that an account stated entitles the creditor to interest. Such a creditor is not entitled to claim interest either by law or upon implied contract, unless a fixed time for payment was agreed upon or a demand for payment was subsequently made, or the

parties have themselves in adjusting their accounts, allowed interest upon balances outstanding—though a jury might, and probably would allow such interest as damages. In such a case, therefore, a claim for interest is not a proper subject of special endorsement.

But in view of Con. Rule 575, notwithstanding in such a case the addition of a claim for interest in the nature of unliquidated damages, final judgment may be rightly signed for the liquidated demand upon the accounts stated, while as to the rest of the claim the judgment should be interlocutory only. And if under these circumstances final judgment for the whole claim has been entered it is not a nullity, but merely irregular, and terms may be rightly imposed on setting it aside.

C. Millar and *C. McCrea*, for appellant George. *C. A. Moss*, for respondent Green.

Mulock, C.J., Ex.D., Anglin, J., Clute, J.] [Dec. 13, 1906.

RE PRESTON.

Trusts and trustees—Trustee de son tort—Infant cestui que trust—Illegal disposition of fund—Payment into Court—Jurisdiction.

Moneys payable to a widow as trustee for her infant child were collected for her by M., and by arrangement between them retained by him and employed in his business. By writing addressed to the widow he acknowledged holding the moneys to the credit of the infant, "bearing interest at the rate of six per cent. per annum."

Held, that M. was a trustee de son tort, and as such either an express or a constructive trustee, and liable to account to his infant cestui que trust, and so entitled to come to the Court, under the Trustee Relief Act, R.S.O. 1897, c. 336, s. 4 (and s. 2, defining "trustee"), and obtain an order allowing him to pay the moneys into Court, against the opposition of the widow, who pressed for payment to her, on the ground that he was simply her debtor.

Semble, also, per ANGLIN, J., that the Court had jurisdiction, as custodian of the interests and property of infants, to order, motu proprio, that which, upon application of the official guardian or of the infant by her next friend, it could and would direct,

by virtue of Rule 938(*d*); and further, if the widow had resided abroad for a year and was resident abroad when the application for payment in was launched, the order might be made under 62 Vict. c. 15, s. 3 (O.)

Order of MABEE, J., affirmed.

Middleton, for the widow. *Raney*, for James Moneypenny.

DIVISION COURT, COUNTY OF LANARK.

Senkler, Co. J.] ANDERSON *v.* CHURCHILL. [Nov. 6, 1906.

Friendly society—Non- payment of dues—Suspension—Payment by secretary for member—Implied request—Recovery back —Subrogation.

In this case the plaintiff was financial secretary of the Perth Lodge of the Ancient Order of United Workmen and was the officer to whom the members of the lodge were required to pay their dues and assessments. The defendant was a member of the lodge. The defendant failed to make payment of his dues and assessments for the months of May, June, July and August, of 1905, but the plaintiff remitted the payments for the four months to the Grand Lodge, reporting the defendant suspended in September of 1905. This action was to recover the amount paid by the plaintiff for the defendant's dues and assessments for the four months.

It was established that according to the constitution of the society, the mere fact of non-payment for one month would without any formal notice by the member operate as a suspension from the society. It was shewn that the defendant had upon a former occasion requested the plaintiff to carry him for a month and had afterwards paid his arrears. It was also shewn that the defendant did not pay his assessment for April, 1905, until after the 1st May.

Held, 1. That as the defendant had upon a former occasion requested the plaintiff to keep him in good standing, the onus was on the defendant to shew that he had revoked what was an implied request to keep him in good standing.

2. That although the plaintiff had in the first instance re-

mitted for the defendant out of the funds of the local lodge, that as he was obliged to make good the amount, he was entitled to be subrogated to the rights of the lodge and had the right to sue.

Judgment for plaintiff for full amount of the four months' dues and assessments.

F. W. Hall, for plaintiff. *J. A. Stewart,* for defendant.

Province of Nova Scotia.

SUPREME COURT.

Meagher, J.] HART *v.* CITY OF HALIFAX. [Nov. 26, 1906.

Municipal Corporation—Illegal expenditures—Action by ratepayer—Attorney-General a necessary party.

Plaintiff, a ratepayer of the City of Halifax, in an action brought in his own name, sought to have declared illegal and re-payment enforced of moneys paid by the city to cover the expenses of the mayor and city engineer, delegates appointed to attend the convention of Canadian municipalities held at Winnipeg in July, 1905.

Held, that in the absence of any clause in the city charter authorizing such expenditures as those in question the expenditures were illegal and the moneys paid could be recovered in an action for that purpose at the suit of the city, to which the Attorney-General would be neither a necessary nor a proper party. But in this case, the city having declined to sue or to allow its name to be used for that purpose, the action must be in the name of the Attorney-General, and could not be brought in the name of plaintiff without shewing that he had suffered special injury.

Allison, for plaintiff. *Bell,* for defendants.

Full Court.] REX *v.* CLARK. [Nov. 28, 1906.

Canada Temperance Act—Form of conviction—Averment that penalty was proceeded for within three months not necessary —Amendment of information—Waiver of right to adjournment—Objection cannot be taken subsequently.

Defendant was committed to jail for a third offence against the Canada Temperance Act. On motion for his discharge under proceedings in the nature of a habeas corpus the ground chiefly relied on was that the conviction should shew affirmatively that the informations were laid within three months after the offences for which defendant was convicted were committed.

The commitment was regular on its face and while it did not disclose the dates of the laying of the informations in the first and second prosecutions the other proceedings brought up did, and shewed that the informations were respectively laid within the three months limit.

Held, following *Wray* v. *Toke*, 12 Q.B. 492, that it was not necessary to aver in the conviction that the penalty was proceeded for within three months next after the offence.

R. v. *Adams*, 24 N.S.R. 559, overruled.

The information as originally sworn alleged an offence between the 24th September and the 15th October, but upon application by the prosecutor at the trial, the "15th" was amended to the "16th" so as to embrace the offence of keeping for sale liquor seized on defendant's premises on the 15th. The information was re-sworn and defendant was expressly informed of the amendment and declared himself ready to proceed with the trial on the amended charge.

Held, that having waived his right to an adjournment he could not afterwards object that he had not sufficient time.

J. J. Power, in support of application. *Ralston*, contra.

Townshend, J., Graham, E.J., Meagher, Russell and Longley, JJ.] [Dec. 8, 1906.

THE KING *v.* CURRIE.

Criminal information against magistrate for acting illegally— No allegation of corrupt motive.

Motion under the Crown Rules for leave to exhibit a criminal information, against the defendant, a justice of the peace, for

the County of Hants. The applicant in her affidavit swore that she had been arrested on August 2nd, 1906, under a warrant, based on an information, laid on August 1st, 1906, before the defendant, by his sister-in-law, for the theft of her watch, that she had been put on trial, after a preliminary examination, at which she gave evidence, held on the day of arrest, that a bill had been ignored by the grand jury, at Windsor, Nova Scotia, in September last, that she was innocent of the offence, that she believed that the defendant had been actuated in his judicial conduct by corrupt motives, and that he had been actively engaged for the last thirty-three years discharging magisterial functions. The defendant filed an affidavit denying that he knew he was acting illegally at the instance of his sister-in-law, but stating that he would have given the applicant time to prepare her defence, if she had asked for it, and that he did not act from any corrupt motive.

TOWNSHEND, J.:—We are all of opinion that this application must be dismissed, because it has not been shewn that the magistrate had acted corruptly, but we think it was very improper for him to act in the matter at all. He should have referred the prosecutrix to another magistrate. The application is dismissed.

J. J. Power, for the motion. *Drysdale*, K.C., Attorney-General, for defendant.

Province of Manitoba.

COURT OF APPEAL

Full Court.] MACDONALD v. DRAKE. [Oct. 22, 1906.

Company—Liability of directors for wages.

The plaintiff, having recovered a judgment against a company incorporated under the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, for wages, and an execution on such judgment having been returned nulla bona, brought this action under s. 33 of the Act, against two persons who had been elected and had acted as directors of the company during the whole

term of the plaintiff's employment, to recover the amount of his wages.

The defendants shewed that they did not own the stock that stood in their names absolutely in their own right, but one as security for an accommodation indorsement, and the other as trustee for his father, and both claimed that, under s. 27 of the Act, they were not qualified to be directors, and, therefore, that s. 33 did not apply to them. Both had, however, acted as directors de facto, had attended many meetings of directors and taken part in the management of the company's affairs.

Held, affirming the verdict of the County Court for plaintiff, that the defendants were liable to him for the amount claimed.

Directors who are only such de facto and not de jure may bind the company in all dealings with persons acting in good faith without notice of defects in the appointment of such directors. *Re County Life Assurance Co.*, L.R. 5 Chy. 288, and *Mahony* v. *East Holyford Mining Co.*, L.R 7 H.L. 869.

If, then, persons can, by acting as; and holding themselves out to third parties to be, directors, estop the company, as against persons dealing with it in good faith, from denying the legality of their appointment, much more should they be estopped, as against such persons, from disputing the regularity of their elections or that they were legally qualified to hold such office.

Held, also, that the provision in s. 33 is remedial and not penal in its nature, being only the withholding from directors, in respect of wages, of the freedom which the statute would otherwise give them from personal liability for all debts of the company.

Crichton, for plaintiff. *Hoskin*, for defendants.

Full Court.] ROGERS *v.* BRAUN. [Nov. 30, 1906.

Contract—Construction—Agent "producing" a purchaser to vendor of land—What may amount to a refusal of an offer.

Appeal from decision of MATHERS, J., noted ante (Vol. 42, p. 543), allowed with costs.

Held, that, under the circumstances there stated, the plaintiff had not within the meaning of the agreement, produced the proposed purchaser to the defendant within the time limited, nor could it be said that the defendant had refused the offer.

Haggart, K.C., for plaintiff. *Pitblado*, for defendant.

KING'S BENCH.

Mathers, J.] WATT *v.* POPPLE. [Nov. 3, 1906.

Practice—Adding party as co-plaintiff—Consent in writing must be signed personally—King's Bench Act, Rule 242 (b).

The plaintiff applied for leave to add his former co-partner as a party plaintiff in the action. The co-partner had absconded and the plaintiff signed for him a consent in writing to be added as a plaintiff, relying on the authority of a partner to sign such name.

The referee dismissed the motion. Rule 242 (*b*) of the King's Bench Act provides that "No person shall be added or substituted as a plaintiff . . . without his own consent in writing thereto to be filed."

Held, following *Fricker* v. *Van Grutten* (1896) 2 Ch. 649, that the personal signature of the party is required by the rule and the signature of an agent, however undoubted his authority, is not sufficient.

Appeal from referee dismissed with costs in the cause to the defendant in any event. A substantive motion for leave to amend by adding the co-partner as a defendant was granted on the same terms as to costs.

Mulock, K.C., for plaintiff. *McKerchar,* for defendant.

Mathers, J.] FRASER *v.* C.P.R. Co. [Nov. 8, 1906.

Examination for discovery—Duty of officer under examination to obtain information to enable him to answer questions on oath.

On his examination for discovery, one of the defendant company's officers, in answer to the questions asked, proceeded to read from a memorandum prepared beforehand by one of the defendants' solicitors and purporting to contain the information asked for. The memorandum had been placed in his hands about an hour previously. He knew nothing of the facts otherwise than as stated in the memorandum and he had not verified its accuracy. The plaintiff's solicitor objected to the evidence being given in that way, when the officer refused to answer without the memorandum because he had no knowledge of the facts apart from its contents.

Held, on appeal from the Referee, that the officer should avail himself of the best sources of information and put himself in a position to answer all proper questions without the aid of a memorandum, or if he cannot rely upon his memory for all the facts he may rely upon a memorandum prepared by himself or otherwise under such circumstances that he can pledge his oath to its accuracy. If the information is contained in documents, books or papers, he must inspect them if he has an enforceable right to do so, and if the inspection is wrongfully refused he must take proceedings to enforce it: Bray's Digest, p. 53. If the information is contained in documents or papers in the custody of another officer of the corporation, he must not be satisfied with the statement of such other officer as to their existence or contents, but must inspect them himself. *Bolckow* v. *Fisher*, 10 Q.B.D. 161, and *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 657, followed.

Welsback Co. v. *New Sunlight* (1900) 2 Ch. 1, distinguished.

Order made accordingly.

Mulock, K.C., for plaintiff. *Aikins*, K.C., for defendants.

Province of British Columbia.

SUPREME COURT.

Martin, J.] [Nov. 21, 1906.

NORTHERN COUNTIES INVESTMENT TRUST *v.* CANADIAN PACIFIC RY. CO.

Railway—Damage by fire—Sparks from engine—Inflammable material on right of way—Limitation of actions.

This was an action for damages for setting fire to the plaintiffs' orchard adjoining the right of way of the defendants' railway; the fire being alleged to have been caused through sparks having been omitted from the engine. The jury brought in a verdict of $2,500 damages and on motion for judgment on the verdict of the jury, it was opposed by defendant counsel on the ground that the action was barred because it was not brought within six months as required by s. 27 of the Consolidated Railway Act, 1879, which the defendants claimed the benefit of. The negligence found consisted also in allowing an accumulation

of inflammable material on the right of way and the user of a defective engine, resulting in a fire spreading from the right of way to plaintiff's property. It was questioned whether or not apart from the limitation of the action, this damage came within the expression "by reason of the railway" used in said section.

Held, that said damage was included in such expression; and that as the section referred to of the Consolidated Railway Act was incorporated in the special charter of the defendant company, the action would not lie as having in fact been brought within the six months' limitation and that this was not effected by the extension of time granted by s. 242 of the Railway Act, of 1903.

Martin, K.C., for plaintiff. *Davis, K.C.,* for defendant.

Book Reviews.

The Supreme Court Act, R.S. c. 139 (1906), and Rules, with reference to all the decisions of the Court dealing with its practice and jurisprudence, by EDWARD ROBERT CAMERON, one of His Majesty's Counsel, and Registrar of the Court. Toronto: Canada Law Book Company, Limited, 1907.

This compilation will be of great benefit to the profession, especially as some eight years have elapsed since the publication of the second edition of Mr. Cassel's book. The author reminds us that in the Revised Statutes of 1906, the sections of the old law relating to appellate jurisdiction of the Supreme Court are entirely re-drafted, but that this revision, however, makes no alteration in the law.

The book is in three main divisions: 1. The Supreme Court Act. 2. The rules and orders, which are given as they stand to-day amended by the different orders passed since February, 1876. 3. An appendix referring to appeals under special Acts; such as, Exchequer, Election, Railway, Winding-up and Criminal appeals, and the Orders of the Privy Council.

The construction adopted is to give the various sections and rules under their numerical order, and at the end of each, under appropriate headings is given a digest of the authorities bearing upon them. We may well suppose that one so familiar with the subject as is Mr. Cameron has not omitted any case which might

helpfully be referred to by those seeking light on the various sections of the Act, or the rules of Court.

The author has prepared a very useful statement, designated "a key," for determining questions of jurisdiction under the Supreme Court Act. As a matter of convenience it would have been better if this instructive table had appeared in more extended form and larger type. This book well fills a vacant place.

The Law of Probate, including Administration, Guardianship, Contentious proceedings, Custody of infants, Succession duty, etc., by A. WEIR, B.A., LL.B., author of the Law of Assessment. Toronto: Canada Law Book Company, Limited, 1907.

With characteristic modesty the author gives the reader no preface; but, what is of much more importance, he gives an excellent book on a subject with which he is evidently very familiar. It is over twelve years since we had a book on the subject of probate. It is unnecessary, therefore, to dilate upon the need of something up to date on this most important subject.

Mr. Weir has written a concise and comprehensive treatise on the practice relating to all matters within the jurisdiction of the Surrogate and Probate Courts. Each step in these proceedings is commented upon and practical directions given and supplemented with appropriate forms.

This book may be said to go even beyond the law of probate. It touches upon the requisites of valid testamentary dispositions, testamentary capacity, undue influence, etc. It also deals with the revocation and revival of wills and survivorship, and various other matters which are not readily accessible elsewhere. The much discussed and little understood Devolution of Estates Act and its amendments have received careful attention. The Succession Duty Act, which has proved so important a source of revenue to the country receives due attention in its exposition.

The forms are numerous, as they should be in a book of practice, and seem to have been carefully selected and revised, and the index is unusually complete and well arranged. We really have nothing but commendation for this, Mr. Weir's second effort at book making, and we shall hope to hear from him again in some other branch of law or practice.

Canada Law Journal.

VOL. XLIII. FEBRUARY 1. NO. 3.

ENGLISH AND ROMAN LAW.

Notwithstanding what has been said by Coke and Blackstone in favour of the supposed autochthonous character of English law, very few modern lawyers, who have considered the matter, can doubt that in many most important particulars English law is really founded and built up on principles derived from the Roman law. That majestic creation of human genius which for so long dominated Europe and even to-day is the fountain of most of its jurisprudence, forms a mine of juristic learning fortified by experience, which it would have been folly for English lawyers in search of sound rules of decision to neglect or ignore. English law cannot be said to have been founded on Roman law in the sense in which that of countries which have adopted the civil law may be said to be, at the same time our indebtedness to it is a matter of no reasonable doubt, and in this respect the eclectic genius of the English people is manifested in the way in which they have selected from its principles what seemed best for themselves, adopting what makes for freedom and liberty, and rejecting what makes for absolutism.

The debt we owe to Roman jurisprudence is obviously well indicated by our legal phraseology—where, for instance, does the word "action" as applied to legal proceedings come from, except it be the Roman "actio," and when we classify actions as being either in rem, or in personam, we are clearly following Roman precedent. Where does our idea of a writ of summons as the way of beginning an action come from but from the Roman proceeding of "vocatio in jus?"

Where we talk of vindicating our rights is it not the Roman procedure of "vindicatio" which is probably at the foundation of the idea which we wish to express. Possession in its legal and technical sense is undoubtedly derived from the Roman "possessio."

Title by "prescription" is, when we come to think of it, a curious term well known amongst us; it has, as we all know, nothing to do with doctors or their prescriptions, but why and how did "prescription" come to designate a title acquired by length of possession with which it appears to have no connection? If we would find an answer we must seek it in the Roman law, where we shall find that the "prescriptio" was a formal part of the "formula" or pleading at one time in force under the Roman law, and that the "prescriptio" as its name denotes, was placed at the beginning of the whole "formula" for the purpose of limiting the injury; and where a defendant claimed to have acquired a title by length of possession to the subject matter of the action, he set it up in the "prescriptio," which had the effect of limiting the injury to that one point, and hence it came to pass that this mode of pleading gave its name to a title acquired by length of possession, as it has also done with us who have never adopted the mode of pleading which gave birth to the term.

When we talk of taking "exceptions" to pleadings or evidence, the Roman "exceptio" is probably at the root of the idea.

In our law affecting testate and intestate estates we should naturally expect to find Roman terms of art employed, because it is well known the civil lawyers had a good deal to do with moulding that branch of the law, nor are we disappointed. "Testament," "codicil," "legacy," "ademption" of legacies, "nuncupative" wills, "bona vacantia," "donatio mortis causa" are all terms of art, derived from Roman law. It is true we use the word "codicil" in a somewhat different sense—with the Romans it was a sort of supplementary will, but not necessarily executed with the formalities of an ordinary testament.

Even the Roman law which rendered a will invalid unless the heir was expressly named therein, and which was never adopted in English law, has lingered amongst us as a sort of popular traditionary law, expressed in the popular phrase of "cutting off the heir with a shilling."

In the field of contract we find the words "contract," "stipulation," "obligation," "debtor," and "creditor," are all deriva-

tives from Roman words expressing the same ideas. And when we talk of novation of contracts, we are borrowing the "novatio" Roman law—and "undum pactum" is also a distinctly Roman law term.

Our equity law, which took its rise in circumstances somewhat similar to those which gave rise to the prætorian law of ancient Rome, has borrowed many of its principles from Roman jurisprudence.

The fiduciary is none other than the "fiduciarius" of Roman law in an English dress. Our process of discovery seems to have its origin in the practice of the Roman law which enabled a cestui que trust to examine his trustee on oath as to the alleged trust. Injunctions have their prototypes in the interdict of Roman law, and many other instances might be found to shew how much this branch of law has been built up on Roman principles.

Our law relating to partnerships and corporations has in like manner been similarily inspired. Even the idea that the fees paid to members of the learned professions, such as doctors and lawyers, were in the nature of "honoraria" and not the subject of action, is plainly derived from Roman law.

But it is not the object of this paper to trace all the particulars in which our law, or legal ideas, and principles, are derived from the law of ancient Rome, but rather to call attention more particularly to our legal phraseology which has so palpably a Roman origin, and to suggest, that whenever we find English and Roman law alike, or very similar, we may not unreasonably conclude that our legal ancestors who so evidently adopted the language of Roman Law, may have also adopted its principles.

A very striking and concrete case, shewing the method employed appears to be furnished by Lord Holt's celebrated judgment in the case of *Coggs* v. *Bernard*, where he adopts the phraseology of Roman law with regard to the different kinds of bailments, and founds himself on Bracton, who in turn borrowed his law from the Institutes without acknowledgment.

GEO. S. HOLMESTED.

LAW BREAKING IN HIGH PLACES.

If we read aright the information contained in the daily papers of Toronto we have an illustration as to how law makers occasionally become law breakers.

Chapter 15 of the statutes of Ontario for 1906 is an Act to provide for the supply and transmission of electric power for the use of municipalities. The Hydro-Electric Power Commission of Ontario is created by that statute, one of the members thereof being a member of the Executive Council of Ontario, and upon this Commission are conferred most extensive powers, including the exercise of judicial functions in certain cases.

Section 6 makes provisions for the furnishing by the Commission to municipalities desiring to take the benefit of the Act all necessary estimates, plans and specifications as to the works necessary for the distrubution of power so to be supplied, and a statement of the terms and conditions upon which such electrical power may be transmitted and supplied, together with a form of the contract to be entered into between the municipal corporation and the Commission.

Section 7 then authorizes the municipal corporation to submit to the duly qualified electors a by-law authorizing the municipal corporation to enter into the contract above referred to, and, in case such by-law receives the assent of the majority of the electors voting thereon, such contract may be entered into and executed by the Commission and the corporation, subject to the approval of the Lieutenant-Governor in Council.

It would appear that the Chairman of the Commission, who is a member of the Ontario Government, has been on a tour through the Province for the purpose of explaining the meaning of the Act, and urging municipalities to take advantage of its provisions.

A by-law purporting to be the child of s. 7, prepared by the Commission and endorsed by the Council of the city of Toronto was recently submitted to the electors, and carried by a large majority. Before the submission of this by-law, at a public meeting held in the city, the Chairman of the Commission, in

answer to a question, admitted that the conditions precedent required by s. 6 had not been complied with, and that no contract had been prepared or even discussed; but he nevertheless urged the public to vote for the by-law, which, though it purported to be made pursuant to the statute, gave none of the information which the legislature provided should be given to electors to enable them to record an intelligent vote. There would seem therefore to be no doubt that the by-law is illegal, and the vote not the expression of the will of the people in the manner desired and intended by the legislature.

It is not material for the present discussion whether the Commission or its Chairman or the municipal council of the City of Toronto is to blame for the defective and therefore illegal by-law, which was sent to the people. The fact remains that both the Chairman and the Commission and the Mayor and Board of Control of the city were very active in favour of obtaining an affirmative vote on the by-law.

All this presents a somewhat striking spectacle and one which is not merely of passing interest, for it concerns the administration of the laws of the land by those entrusted therewith. The Commission being given judicial powers in certain cases it is necessary that its members should act judicially in all matters connected with the Commission. The governing body of a municipality has also large powers and great responsibility and should act with due regard thereto. It may safely be said that in this very important matter they have one and all acted without that consideration and regard to the obligation imposed upon them by their respective positions to observe the law which they undertook to administer.

Apart from the question as to whether it is desirable or dignified for a member of the Government and one holding a judicial position to travel the country and make strong appeals to the electors to avail themselves of the services of the Commission of which he is the head (which is perhaps more than a mere matter of taste), it certainly is desirable to comment upon the more important features of this matter to which we have already

alluded, even though, in this case, no great harm may have resulted. And further it may be remarked that if no protest is entered (and as yet we have heard nothing of any motion to quash this by-law, probably because it is not thought worth while) the action of those occupying these high positions might be looked upon as a precedent for further breaches of a very important Act, which, as we have already stated, for certain purposes, creates a new judicial forum or Court having very extensive powers, of the extent of which no one can at present form an opinion.

It ought not to be necessary at this time of day to re-assert the proposition that no circumstances or motives of expediency or alleged benefit of the public should be permitted to form an excuse for those clothed with judicial powers or statutory authority as makers of the laws or administrators thereof to aid in the breach of any law; especially in a case of this kind, where the enactment was evidently intended for the protection of the community by requiring information to be given without which no intelligent vote could be cast.

THE LORD CHANCELLOR ON JUDICIAL APPOINTMENTS.

In England the selection of men to hold the position of justices of the peace is of much more importance than it is in Canada, their jurisdiction and duties being more extensive, and a greater responsibility being thrown upon them. In that country the Lord Chancellor acts for the Government in appointing its justices of the peace as well as the other judges of the land. The exigencies of party politics are detrimental even in staid old England. Here appointments have been made, more especially of late years, at the instigation and demand of party men, which have brought discredit upon the Government making them.

The evil in England is considered to be so great that recently sixty-eight Liberal members of the House of Commons pre-

sented to the Lord Chancellor a memorial praying for some new system of appointment of these magistrates, which would be non-political. The reply of the Lord Chancellor, Lord Loreburn, is well worthy of being reproduced, and should be carefully noted by the powers that be, and not only noted but acted upon, if the Bench in Canada is to retain anything of its historic dignity and efficiency. The Chancellor's remarks were as follows:—

"It is one thing to correct monopolies and open the Bench to the honourable ambition of men of all parties. It is quite a different thing to treat the position of justice as merely or mainly a reward of party services. Yet this is what I am constantly and most unfortunately asked to do, not, indeed, by the great bulk of members, but by some of them, and by many outside. And it is most significant that, with the exception of two or three names, I cannot recall any application from any Conservative member for the appointment of any person as justice of the peace. So widespread and so deeply-rooted seems to be the persuasion that the Bench of justices is the appanage of party, and the Lord Chancellor the mere registrar of party selections. Now this is, in my judgment, a serious danger. Justices of the peace in England and Wales deal with an immense proportion of the total number of criminal cases at one stage or another, and have a jurisdiction which ranges from long terms of penal servitude at Quarter Sessions to slight punishment at Petty Sessions, with practically little chance of appeal. I am certain that I ought not to allow an office which places in men's hands the liberty and reputation of their humblest neighbours to become the subject of political traffic. The principle upon which I have acted, and shall continue to act, is that, if a man is suitable, the fact that he is a strong party man, on whatever side, is no objection. A great proportion of the ablest and most vigorous men are so; and justices, being unpaid, cannot be required as judges are, to lay aside political activity. But I shall not allow a defect in the necessary qualities to be made good by political services or restrict the choice to those who have been politically active. My purpose is that the Bench of justices

shall be constituted on a fair balance of classes and opinions, excluding none; in particular not excluding those who take no part whatever in politics. As for the claims of local members, I must exercise my own discretion as to whom I may consult in any particular case; and I certainly am not prepared to render an account to anyone of my reasons for choosing one man or omitting another. To make appointments on such a footing would be fatal."

A LAWYER'S ACCOUNTS.

The English Law Society, as we learn from the *Law Times* of Dec. 22, ult., has been discussing the appointment of a special committee to consider the advisability of framing rules and regulations as to the method in which a solicitor should (1) keep his accounts and audit them, (2) keep and audit trust accounts, (3) conduct his professional business, etc.

It would appear that recent events across the water have awakened in the public mind a certain sense of uneasiness in these matters, and it was thought that some safeguards, such as proposed, would be helpful.

There is unfortunately some need for more careful bookkeeping and auditing of accounts in this country as well as in England, and possibly our Law Society might do some good, both to the profession and to the public, by discussing this subject and making some suggestions, and if necessary regulations, which would insure more accuracy in the matters referred to, and in safeguarding the public and protecting solicitors against themselves by the auditing of trust accounts, etc.

We all know that the weak spot in almost every lawyer's office is the bookkeeping part of it. In large offices there is necessarily kept a bookkeeper or accountant; but in smaller offices this is generally too expensive a luxury. But even some of those who are in a smaller way of business think it quite worth while to have their clients' accounts, in fact, all their accounts, audited from time to time. This should be a rule and not an exception.

The most important safeguard for both solicitor and client is always to keep a special bank account for moneys belonging to clients; this account never to be drawn on under any circumstances or on any excuse whatever except on client's account. If this proper course had always been adopted, many disasters would have been averted. No careful business man would be likely to entrust his affairs to a solicitor if he knew that his money was to be mixed up with that of his lawyer.

Some of the leading journals in England and the United States have been discussing the position which the British Government would take in case of a war between the United States and Japan. Whilst the danger of such an event seems happily to have passed away, it will be of interest to refer to the treaty between England and Japan, which during its continuance would necessarily govern England's action in case of Japan being involved in war with other powers. The question having been asked whether this treaty would require the British Government to side with Japan in case of a war with the United States, the London *Standard* admitted that such an obligation existed and declared that it would be discharged. As to this treaty, it was signed on August 12, 1905; article 2 providing that:—"Should either of the high contracting parties be involved in war in defence of its territorial rights or special interest, the other party will at once come to the assistance of its ally, and both parties will conduct the war in common and make peace in mutual agreement with any power or powers involved in such war." The words of doubtful import would be "special interest" and diplomatists would have ample scope for lengthy discussion as to their meaning.

The number of that excellent serial the *Living Age* for Jan. 12, reproduces a very readable article from the *Monthly Review* entitled, "The Lords as the Supreme Court of Appeal." This

title is not quite accurate, nor does the writer speak correctly when he styles the House of Lords "the Supreme Court of this Realm." It is only the Court of last resort for the Courts of that part of the Realm known as the British Isles. The writer does incidentally refer to "the Judicial Committee of the Privy Council, which hears appeals from India and the colonies." This is not an unusual mode of expression on the part of some English writers, when speaking of the Greater Britain, including, as it does, such enormous and important territories as the larger part of the North American continent, known as the Dominion of Canada, the great empire of India, the Australian continent and a considerable portion of the continent of Africa. However, even untravelled and insular Englishmen are beginning to learn a few things, and we have hopes of them in time. Eye-openers come to them occasionally. To mention a very small one (but perhaps for that reason to be more appreciated) the "Lady of the Snows," so called, a few weeks ago saw a butterfly enjoying the balmy air of Canada, whilst at the same time men were perishing in the snow storms which swept over the frozen fields of England. We trust our enterprising neighbours to the south of us have not been making any radical changes in the Gulf of Mexico, which would affect the flow of the Gulf Stream.

One of the most important subjects that will engage the attention of the Ontario Legislature at its present session, at least to professional men, is that of company law. The Provincial Secretary has introduced a Bill, which has been widely distributed amongst the profession and others with a most laudable desire of obtaining any suggestion which might be helpful in framing an Act dealing with the many important and difficult problems arising in connection with company law. Want of space prevents further reference to this Bill at present; but we hope to refer to it more fully in our next issue. In the meantime we would suggest to those of our readers who feel any interest

in this matter to read the Bill (copies may be had upon application to the Department), and make any suggestion to the member having it in charge. Now is the time to suggest any alteration, amendment or addition.

"Good wine needs no bush," and we are sure our readers will appreciate the fine rich flavour of the following samples of answers given by candidates at a law examination held in a sister Province somewhat less than a hundred years ago. We are particularly struck by the clear crisp definition given in No. 2. and the more long drawn-out sweetness of No. 3, the author of which must surely have been an unlicensed conveyancer in some previous state of existence.

The questions and answers are as follows:—

1. Explain and illustrate the maxim "Equality is equity."

ANS. Where the performance of something which has been undertaken has become impossible, and another agreement is proposed of equal value to take its place equity will favour such new arrangement for "equality is equity."

2. What is an executory consideration?

ANS. An executory consideration is a consideration paid to an executor.

3. Outline an essential feature of a valid conveyance?

ANS. A valid conveyance must contain "This Indenture" whether in duplicate or triplicate, the date, the party hereinafter referred to as the party of the first part, and the party hereinafter referred to as the party of the second part, and then a little lower down there is "To Have and to Hold," which is usually put in capital letters.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

WILL—CONSTRUCTION—BEQUEST—"MONEY INVESTED IN" SPECIFIED SECURITIES—SUBSEQUENT CHANGE OF INVESTMENT—WILLS ACT, 1837 (1 VICT. C. 26) S. 24—(R.S.O. C. 128, S. 26).

In *Re Slater, Slater* v. *Slater* (1906) 2 Ch. 480 a testator had bequeathed the interest arising from his money invested in the Lambeth Water Works Company. After the date of the will and before the testator's death the Lambeth Water Works Company's undertaking had been taken over by the Water Board under the provisions of a statute, and a sum of Metropolitan Water Stock had been issued to the testator in lieu of his shares in the company, and these substituted shares were held by him at the time of his death. Joyce, J., held that the Metropolitan Water Stock did not pass, that the will as to the property described in it must, under s. 24 of the Wills Act (R.S.O. c. 128, s. 26), be taken to speak and take effect as if executed immediately before the testator's death, and at that date there was no money invested in the specified security on which the bequest could operate.

COSTS—SEVERAL ACTIONS — SEVERAL APPEARANCES IN SEPARATE ACTIONS ENTERED AT THE SAME TIME—ENTERING APPEARANCE.

In *Price* v. *Clinton* (1906) 2 Ch. 487 Joyce, J., held that where there are numerous actions by different plaintiffs against the same defendant, and the defendant's solicitor enters appearance in all the actions at the same time, he is entitled to be allowed for a separate attendance in respect of each entry.

COPYRIGHT — ILLUSTRATED TRADE CATALOGUE — "BOOK" COPYRIGHT ACT, 1842 (5 & 6 VICT. 3. 45), S. 2.

Davis v. *Benjamin* (1906) 2 Ch. 491 need only be briefly mentioned. It deals with a matter of copyright law and Eady, J., holds that a trade catalogue illustrated, with no letter press except the names of the advertising firm and the names and prices of the articles, is a sheet of letter press and therefore a

"book" within the meaning of the Copyright Act, 1842 (5 & 6 Vict. c. 45), and an injunction restraining the infringement of the copyright was granted.

PLEADING—PARTICULARS—LOST GRANT.

Palmer v. *Guadagni* (1906) 2 Ch. 494 deals with a narrow point of practice. The defendants in their defence set up a lost grant, but omitted to state the date or the names of the parties thereto. The plaintiff applied to strike out this allegation unless particulars of dates and parties were furnished. Eady, J., refused the application holding that under the modern practice such particulars could not be required in the case of a lost grant where, as here, the defendants were insisting that the facts warranted a presumption of the existence of such lost grant.

PRACTICE—DECLARATORY JUDGMENT — DECLARATION THAT EXPIRED PATENT WAS INVALID—RULE 289—(ONT. JUD. ACT S. 57(5)).

In *North Eastern M.E. Co.* v. *Leeds Forge Co.* (1906) 2 Ch. 498 the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.), have affirmed the decision of Joyce, J. (1906), 1 Ch. 324 (noted, ante, vol. p. 339), to the effect that an action will not lie merely to obtain a declaration that a patent which has expired was invalid.

LESSOR AND LESSEE—OPTION TO PURCHASE—CONTRACT TO CONVEY —REMOTENESS—PERPETUITY—DAMAGES.

Worthing v. *Heather* (1906) 2 Ch. 532 was an action for alternative relief. The plaintiff claimed specific performance of a contract to convey certain lands pursuant to an option, or for damages for breach of the covenant to convey upon the plaintiffs electing to exercise the option to purchase. The lease in which the option was contained was one for 30 years, and the option was thereby given to the lessees to purchase the reversion in fee of the demised premises at any time during the continuance of the term. This option Warrington, J., held was invalid as being an infringement of the rule against perpetuities and therefore could not be enforced by specific performance, and the fact that lessees were a charitable corporation was held to make no difference, but he held that the plaintiffs were entitled to damages for breach of the covenant to convey.

ANCIENT LIGHTS—EASEMENT—ALTERATION OF DOMINANT TENEMENT—INCREASED BURDEN ON SERVIENT TENEMENT—DESTRUCTION OF EASEMENT—ACTION FOR DECLARATION THAT TENEMENT IS NOT SUBJECT TO AN EASEMENT.

Ankerson v. *Connelly* (1906) 2 Ch. 544 was an action for a declaration that the plaintiff's tenement was not subject to an easement of light in favour of the defendant's adjoining tenement. The defendant had acquired an easement of light as against the plaintiff's tenement, but subsequently he had altered his own premises so as to prevent the access of light except over the plaintiff's premises, and if he had not done this the plaintiff could have built on his land without interfering with the defendant's right to light. Warrington, J., held that this alteration had the effect of destroying the easement altogether, and he made the declaration asked.

COPYRIGHT—EQUITABLE ASSIGNMENT—BARGAIN WITH AUTHOR TO WRITE AND SELL STORY TO PUBLISHER—SUBSEQUENT SALE OF COPYRIGHT TO ANOTHER—COPYRIGHT ACT, 1842 (5 & 6 VICT. C. 45), SS. 2, 18.

Ward v. *Long* (1906) 2 Ch. 550 was an action to restrain the infringement of a copyright. The plaintiff's right was acquired under a contract made with one Shiel to write for the plaintiff for a certain sum a story of a certain length. The story was written, but proved not to be of the specified number of words and the plaintiffs refused to pay the full price agreed. Shiel then purported to sell the copyright in the story to the defendants who bought without notice of the plaintiff's rights. Kekewich, J., held that the contract with the plaintiff constituted a good contract for the purchase of the copyright of the story and a good equitable assignment of it to the plaintiffs and therefor that they were entitled to the injunction they claimed.

PRACTICE—SPECIAL LEAVE TO APPEAL TO KING IN COUNCIL.

In *Victorian Railway Commissioners* v. *Brown* (1906) A.C. 381 the Judicial Committee of the Privy Council have applied to Australian appeals the same rule as they have laid down with regard to Canadian appeals in *Clergue* v. *Murray* (1903) A.C. 521, viz., that where the petitioners for leave to appeal elected to appeal to a colonial Court from which it is known there is

no further appeal except by leave. Their Lordships will not grant that leave except in a very special case.

TRADE UNION—LIABILITY OF UNION FOR ACTS OF DELEGATES—PRINCIPAL AND AGENT—AUTHORITY OF BRANCH OFFICIALS TO BIND UNION—RATIFICATION—PAYMENTS TO WORKMEN ON STRIKE.

Denaby and C. M. Collieries v. *Yorkshire Miners' Association* (1906) A.C. 384 was an action brought by the plaintiffs against a trade union to recover damages on the ground that the defendants by their officials had induced the plaintiffs' workmen to break their contracts with the plaintiffs and that the union had ratified and adopted the act of their officials. At the trial the jury appear to have given a sweeping verdict in favour of the plaintiffs for whom judgment was given by Lawrance, J., which was subsequently reversed by the Court of Appeal. The House of Lords (Lord Loreburn, L.C. and Lords Macnaghten, Davey, James, Robertson and Atkinson), affirmed the decision of the Court of Appeal principally on the ground that the findings of the jury were not warranted by the evidence. It appeared that the officials whose action was complained of, were representatives of local branches in the council of the union, but that their action was not expressly authorized by the union, and, on the contrary, was contrary to the rules of the union, and their Lordships held that their position as representatives did not make them agents of the union, and that the payment of maintenance to the plaintiff's workmen who went on strike did not make the union in anyway liable to the plaintiffs.

PATENT—CONSTRUCTION—INFRINGEMENT—EXERCISE AND VEND—SALE IN ENGLAND—DELIVERY ABROAD.

In *Badische Anilin und Soda Fabrik* v. *Hickson* (1906) A. C. 419, the House of Lords (Lord Loreburn, L.C., and Lords Davey, James, Robertson and Atkinson), have unanimously affirmed the judgment of the Court of Appeal (1905) 2 Ch. 495 to the effect that where a contract is made in the United Kingdom to sell patented goods which are abroad and the contract is completed by the appropriation or delivery of the goods abroad, the vendor does not "use, exercise or vend" the invention in the United Kingdom within the meaning of the patent, and consequently that it is no infringement.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J.O., Osler, Garrow, MacLaren, JJ.A., Teetzel, J.] [Nov. 12, 1906.

ROBINSON *v.* MCGILLIVARY.

Bankruptcy and insolvency—Preferential transfer of cheque—Deposit with private banker—Application by banker upon overdue note—Absence of pre-arrangement and of intent to prefer.

On an appeal from the judgment reported 12 O.L.R. 91; 42 C.L.J. 514, the judgment of Divisional Court was affirmed.

Gibbons, K.C., and *G. S. Gibbons,* for appellants. *T. G. Meredith,* K.C., and *Blewett,* contra.

Full Court.] [Nov. 21, 1906.

IN RE ONTARIO MEDICAL ACT.

"To practise medicine"—Use of drugs and other substances —Construction—Reference by Lieutenant-Governor.

Case referred by the Lieutenant-Governor under R.S.O. 1897, c. 84.

Held, that the words "to practise medicine" in s. 49 of the Ontario Medical Act, R.S.O. 1897, c. 176, cannot be construed, except as concrete cases arise, further than in some such way as follows: If it were shewn that a person not registered under the Ontario Medical Act attempted to cure or alleviate disease by methods and courses of treatment known to medical science, and adopted and used in their practice by medical practitioners registered under the Act, or advised or prescribed treatment for disease or illness such as would be advised or prescribed by the registered practitioner, then, although what was done, prescribed or administered, did not involve the use or application of any drug or other substance having or supposed to have the pro-

perty of curing or alleviating disease, he might be held to be practising medicine within the meaning of this section.

Per MEREDITH, J.A.—The words "practise medicine" in s. 49, should be given their primary and popular meaning, namely, practising the art of healing the sick by means of medicine and drugs.

Held, also (GARROW, J.A., dubitante, and MEREDITH, J.A., dissentiente), that a reference to the Court to determine the construction of the above section was competent to the Lieutenant-Governor in Council, under R.S.O. 1897, c. 84, s. 1, being "An Act for expediting the decision of constitutional and other provincial questions.

Per GARROW, J.A.—A patient ought reasonably to be held to be at liberty to go to the christian scientist, the osteopath, the medical electrician, the masseuse, etc., and request, obtain and pay for the treatment which these persons give so long as he does his own diagnosing and prescribing.

W. Nesbitt, K.C., and *H. S. Osler*, for the College of Physisians and Surgeons of Ontario. *S. H. Blake*, K.C., and *J. E. Dry*, for the Osteopaths. *H. Cassels*, K.C., and *R. S. Cassels*, for the First Church of Christian Scientists. *W. M. Hall*, for other Christian Scientists.

Full Court.] [Nov. 24, 1906.

PRESTON *v.* TORONTO RAILWAY CO.

Negligence—Street railway—Piling snow at side of track—Contributory negligence—Plaintiff putting himself in peril.

On an appeal from the judgment reported 11 O.L.R. 56; 42 C.L.J. 38, the judgment of the Divisional Court was affirmed, MEREDITH, J.A., dissenting.

W. Nesbitt, K.C., and *D. L. McCarthy*, for appellants. *Sherley Denison*, contra.

Full Court.] [Dec. 1, 1906.

IN RE MCKENNA AND TOWNSHIP OF OSGOODE.

Municipal law—Drainage—Engineer's report—Delay—Extension of time.

Sec. 9, sub-s. 8 of the Municipal Drainage Act, 62 Vict. (2) c. 28(O.), provides that the report of the engineer upon a muni-

cipal drainage scheme shall be filed within six months after the filing of the petition, provided that upon the application of the engineer the time may be extended from time to time for additional periods of six months, when the council is satisfied that owing to the nature of the work it was impracticable for the report of the engineer to be completed within the time limit. In this case the engineer was appointed to make examination and report in August, 1900. No report was made until February, 1905, and no excuse was shewn for the delay except a statement of the engineer that he was unable owing to press of other work and lack of assistance to proceed with the examination of the area involved. The report was adopted in June, 1905, and in the following month was provisionally adopted by by-law. There were a number of extensions granted in connection with the making of the report, but several of them were after the extended time had expired, so that there were periods when the engineer had no authority or right to proceed with the work; and the council did not act upon the right given it by sub-s. 9 of s. 9, to procure another engineer to go on with the work.

Held, that when the report was made the petition was not on foot and there was therefore no warrant to the council for adopting the report or founding a by-law upon it.

The power of extension given can only be exercised under the condition described in sub-s. 8. It is a limited power to extend for good cause. It is dependent upon inability of the engineer owing to the nature of the work, not upon dilatoriness or supineness on his part.

Wilson, K.C., for municipality, appellants. *Latchford*, K.C., for respondent.

Full Court.] [Dec. 24, 1906.

FEDERAL LIFE ASSURANCE CO. *v.* STINSON.

Mortgage—Redemption—Priorities—Execution creditors proving claims in Master's office—Payment of mortgagee's claim—Subsequent statutory assignment by mortgagor for benefit of creditors—Rights of assignee—Assignments and Preferences Act, s. 11.

Upon the usual reference under a judgment for foreclosure or redemption in an action upon a mortgage, four judgment creditors of the mortgagor having writs of fi. fa. lands in the sheriff's hands were added as parties in the Master's office, and

proved claims upon their respective judgments. The Master made his report by which he found that they were the only incumbrancers, and appointed a day for payment by them of the amount found due to the plaintiffs as mortgagees. After confirmation of the report, the respondent obtained assignments of the judgment, and was added as a party defendant by the Master's order. He then redeemed the plaintiffs by payment of the amount found due, and the Master took a subsequent account as between him and the mortgagor in respect of his claims on the mortgage and judgments, and appointed a day for payment by the mortgagor of the total amount. After confirmation of this report, and before the day named for payment, the mortgagor made an assignment for the benefit of his creditors under the Assignments and Preferences Act to the appellant, upon whose application an order was made adding him as a party, extending the time for redemption, and directing a reference back to the Master to take a new account and appoint a new day.

Held, MEREDITH, J.A., dissenting, that, notwithstanding the provisions of s. 11 of the Assignments and Preferences Act, the appellant was not entitled to redeem by payment of the amount due upon the mortgage only, and thus take priority of the respondent in respect of his claim upon the judgments.

Per OSLER, J.A.—Before the assignment to the appellant, the respondent had acquired a new and independent status. By the adjudication of the Court he acquired a lien, charge, or incumbrance upon the lands, and the right as such incumbrancer to redeem the mortgagees—a right which he exercised before the appellant, pendente lite, acquired the equity of redemption by the assignment. Before this, too, his claims on the mortgage and judgments had been consolidated and his right to be redeemed by the mortgagor, in respect of the whole, declared. An interest or charge of this nature is not affected by the Act.

Baker v. *Harris* (1810), 16 Ves. 397, applied.

Order of a Divisional Court affirmed.

D. L. McCarthy, for appellant. *Cassels*, K.C., and *R. S. Cassels*, for respondent.

Full Court.] KERSTEIN *v.* COHEN. [Dec. 24, 1906.

Trade mark—Infringement—Coined word—Similarity—Colourable imitation—Costs.

The judgment of Mulock, C.J. Ex. D., 11 O.L.R. 450; 42 C.L.J. 355, dismissing without costs an action to restrain the

defendants from using the coined word "Sta-Zon" to describe their eye glasses, in alleged infringement of the plaintiffs' registered trade mark "Shur-On," was affirmed on appeal.

J. A. MacIntosh, for plaintiffs, appellants. *J. H. Moss* and *C. A. Moss*, for defendants, respondents.

Full Court.] [Dec. 28, 1906.

RE SINCLAIR AND TOWN OF OWEN SOUND.

Municipal Corporations—Local option by-law—Voting on by electors—Town divided into wards—Objections to by-law.

A by-law enacted under the local option provisions of the Liquor License Act, R.S.O. 1897, c. 245, to prohibit the sale by retail of spirituous liquors within the municipality, was submitted for the approval of the electors of the municipality, as provided by s. 141 of the Act, and was approved by a majority of 476. The municipality being a town divided into wards, it was objected that persons who were ratepayers in respect of property situate in different wards were not permitted to vote more than once on the by-law.

Held, upon a consideration of the provisions of ss. 338 to 375, inclusive, of the Municipal Act of 1903, which are those referred to in s. 141 of the Liquor License Act as prescribing the manner in which the vote is to be taken, that s. 355 of the Municipal Act does not apply to such a by-law; and the objection mentioned and other objections to the by-law were overruled, MEREDITH, J. A., dissenting.

Decision of a Divisional Court, 12 O.L.R. 488, affirmed.

W. Nesbitt, K.C., *Haverson*, K.C., and *W. H. Wright*, for appellant. *F. E. Hodgins*, K.C., and *J. W. Frost*, for respondents.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B., Britton, J., Clute, J.] [Oct. 6, 1906.

RE GEROW AND MUNICIPAL COUNCIL OF PICKERING.

Local option—Treating.

A cattle drover, not being a "temperance man," nor an agent in any way of the temperance people, who were promot-

ing the passage of a local option by-law, having a grudge against a local hotel keeper took an active interest in the passing of the by-law, by treating freely the electors as he travelled through the township with a view as he admitted of influencing them to vote for the by-law.

Held, under the circumstances, that such treating and conduct was not the means of passing of the by-law in violation of the provisions of ss. 245 and 246 of the Consolidated Municipal Act, 1903, which would make it liable to be quashed.

Judgment of Meredith, C.J.C.P., reversed.

Farewell, K.C., and *J. M. Godfrey,* for the appeal. *DuVernet,* contra.

Teetzel, J.] [Oct. 20, 1906.

DAVIES *v.* SOVEREIGN BANK.

Practice—Discovery—"Officer"—Member of a municipal council—Examination of.

The word "officer" in Con. Rule 1250, 439(*a*) as applied to a municipal corporation, does not extend to persons who are merely legislative officers, but only embraces such persons as are officers in the usual sense of that word and under the control of the corporation employed to administer its affairs and execute the will of the legislative body; and while aldermen are in one sense officers of the corporation they are not examinable for discovery under that rule.

Arnoldi, K.C., for the motion. *Mackelcan,* contra.

Falconbridge, C.J.K.B., Britton, J., Mabee, J.] [Oct. 23, 1906.

BURKE *v.* TOWNSHIP OF TILBURY NORTH.

Drainage Act—Variation in contract.

In an action brought against a township corporation and its contractor for damages caused by the variation of the specifications by the contractor for the building of a drain under the Municipal Drainage Act, R.S.O. 1897, c. 226.

Held, that whether the plaintiff was entitled to be compensated or not her claim fell under s. 93 of that Act as amended

and her remedy was by notice and proceedings as provided for by that section and not by writ and proceedings in an action.

H. H. Bicknell, for plaintiff. *A. H. Clarke,* K.C., for township. *C. A. Moss,* for contractor.

Meredith, C.J.C.P., McMahon, J., Anglin, J.] [Oct. 31, 1906.

PETTYPIECE *v.* TURLEY.

Will—Construction—Precatory trust—Power—Execution of.

A testator whose mother owned an estate for life in a farm in which he had a reversion in fee by his will devised to her his interest in the farm "to be disposed of as she may deem most fit and proper for the best interest of my brothers and sisters." The mother after his death deeded the farm in fee simple to one of his sisters, the expressed condition being one dollar and natural love and affection and the deed containing no reference whatever to the will.

Held, that it was not necessary to determine whether the mother took absolutely; or whether, if she did not take absolutely, a trust was created or a power; inasmuch as even if a trust was created in the mother the conveyance by the mother operated and was intended to operate as an execution of the trust, although the whole was granted to one daughter only.

F. E. Hodgins, K.C., for plaintiff. *Rose,* for defendants.

Divisional Court.] [Nov. 7, 1906.

SCHAEFFER *v.* ARMSTRONG.

District Courts Act—Action beyond jurisdiction of County Court—Discretion of district judge as to scale of costs—Rules of Court—Application of.

Where in an action before a District County judge, without a jury, there is a recovery for an amount beyond what could be recovered in a County Courts Act, R.S.O. 1897, c. 109, read in the s. 11 of the District Courts Act, R.S.O. 1897, c. 109, read in the light of the rules of Court applicable thereto either to withhold costs altogether or to grant a certificate therefore on the High Court scale; but he has a discretionary power, and may therefore certify for costs on the County Court scale only.

J. E. Jones, for plaintiff. *A. J. Thompson,* for defendant.

Riddell, J.—Trial.] [Nov. 16, 1906.

ZILLIAX *v.* INDEPENDENT ORDER OF FORESTERS.

Benefit society—Rights of member—Action to establish—Domestic forum—Submission to jurisdiction.

An action to establish the right of a person to membership in a benefit society will not be entertained by the Court, even where the society submits to the jurisdiction, until the remedies provided by the constitution of the society have been exhausted.

A dispute arose as to the plaintiff's right to continue to be a member of the defendant society, and a body of officials of the society decided against him; the plaintiff, instead of appealing to the Grand Lodge, as permitted by the constitution, by which he was admittedly bound, brought an action against the society, which was dismissed, but without costs, and without prejudice to any other action being brought after the remedies provided by the constitution should be exhausted.

C. R. McKeown, for plaintiff. *W. H. Hunter*, for defendants.

Magee, J.] [Nov. 26, 1906.

MCFARLAN *v.* SCHOOL TRUSTEES OF GREENOCK.

Public schools—Change of school site—Meeting to determine—Poll—Right of farmers' sons to vote.

By the Public Schools Act, 1 Edw. VII. c. 39, s. 34 (O.), it is enacted that the trustees of every rural school section shall have power to select a site for a new school house, or to agree upon a change of site for an existing school house, and shall forthwith call a special meeting of the ratepayers of the section to consider the site selected by them; and no site shall be adopted, or change of site made, except in the manner hereinafter provided, without the consent of the majority of such special meeting.

Held, that there is power to hold a poll at such a meeting, and that at such polling persons entered on the assessment roll only as "farmers' sons" are entitled to vote.

Kilmer, for plaintiff. *Ballantyne*, for defendants.

Magee, J.—Trial.] [Dec. 11, 1906.

RYAN *v.* PATRIARCHE.

Arbitration—Submission—Time for award—Failure of arbitrators to extend—Action—Defence of arbitration pending—Stay of proceedings.

A submission to arbitration, dated Oct. 4, 1904, was under seal, and bound the parties to abide by the award so as it was made on or before Oct. 30, 1904, or any subsequent day to which the arbitrators should by writing extend the time. There was no covenant not to take other proceedings. The arbitrators proceeded to consider the matters referred to them and continued the arbitration, with the assent of the parties, for nearly two years, but did not by writing extend the time for the award. The plaintiff brought this action for an account in respect of the matters referred, the arbitration being still uncompleted, and the defendant pleaded the submission and proceedings of the arbitrators as an answer to the action.

Held, that the assent of the parties to the arbitration being proceeded with after the time had expired was equivalent to a parol submission only; s. 3 of the Arbitration Act, which makes submissions of the same effect as an order of the Court, and irrevocable without leave of the Court, applies, by virtue of s. 2, to submissions in writing only; the same is the case with s. 6, which allows an application to stay proceedings; no order extending the time had been made under s. 10; and therefore the arbitration proceedings afforded no answer.

R. D. Gunn, K.C., for plaintiff. *J. E. Day,* for defendant.

Mulock, C.J. Ex. D.—Trial.] [Dec. 12, 1906.

BIGGAR *v.* TOWNSHIP OF CROWLAND.

Highway—Obstruction—Municipal corporation—Misfeasance—Liability for wrongful acts of committee of council—Injury to traveller—Damages.

The municipal council of a township, having decided to construct a ditch along a highway, under the provisions of the Ditches and Watercourses Act, appointed three of their number a committee to meet on the highway, and there to let the contract for the work by public competition. This the committee did,

and, in order to indicate where the ditch was to be constructed, they drove stakes in the highway, one being near the centre of the travelled portion. The contract was let, and the stakes were left in position, projecting about six inches above the ground, and unprotected by barrier, light, or otherwise. One of the plaintiffs in walking upon the highway struck her foot against one of the stakes, and was thrown to the ground, and injured.

Held, that the injury was caused by misfeasance, and that the municipal corporation were liable for the acts of the committee, who were acting within the scope of their authority.

Damages were assessed for the plaintiff who was injured at $1,500 and her husband at $500.

J. F. Gross, for plaintiffs. *W. M. German,* K.C., for defendants.

Mulock, C.J. Ex. D., Anglin, J., Clute, J.] [Dec. 17, 1906.

BOOTH *v.* CANADIAN PACIFIC RY. CO.

County Courts—Right of appeal from—Jury—Order of County Court in term.

Under s. 51 of the County Courts Act, R.S.O. 1897, c. 55, where there has been a trial by a jury of an action in a County Court and a motion has been made to the County Court in term for a new trial and dismissed, no appeal lies from the dismissing order to a Divisional Court of the High Court; but, semble, where the findings of the jury are reversed in term, an appeal lies.

Middleton, for plaintiff. *D'Arcy Scott,* for defendants.

Cartwright, Master.] [Dec. 19, 1906.

BURNS *v.* CITY OF TORONTO.

Municipal law—Excavation—Insecurely guarding—Non-repair of highway—Jury notice—Ontario Judicature Act.

The plaintiff's statement of claim in an action for injuries sustained by falling into an open sewer dug in the street by the defendants alleged that such injuries "were caused by the negligence of the defendants in not securely guarding said sewer and making same safe for passengers using said street."

Held, that the failure of the defendants to guard the excavation was non-repair within the meaning of s. 104 of the Judicature Act, and a motion to strike out the jury notice was allowed.

John T. White, for the motion. *Phelan,* contra.

Boyd, C., Maclaren, J.A., Mabee, J.] [Jan. 8.

ENGELAND *v.* MITCHELL.

Discovery—Production of books — Postponement — Profits of business—Master and Servant Act, ss. 3, 4*—Application to contract alleged—Statement of profits—Right to impeach.*

In an action to recover a share of the profits of a business under an alleged agreement to share profits, the plaintiffs sought discovery of the books of the defendant.

Held, that the consideration of the matter should be postponed until it had been properly determined in the action, as a matter of law and not upon an interlocutory motion, (1) whether the agreement alleged by the plaintiffs was within ss. 3 and 4 of the Master and Servant Act, R.S.O. 1897, c. 157, and (2) whether (if it was) the statement of profits declared by the defendant could be impeached for fraud, error, mistake, or other like cause.

Cutten v. *Mitchell* (1905), 10 O.L.R. 734, discussed.

Cutten, for plaintiffs. *H. Guthrie,* K.C., for defendant Mitchell.

DISTRICT COURT—ALGOMA.

DICKENSON *v.* HUSSEY.

Mischievous animal—Damage by—Liability.

Held, that the owner of a bull kept on defendant's premises is liable for damages resulting from the bull escaping from such premises and entering the plaintiff's field and serving a heifer therein which resulted in loss to the plaintiff; the defendant under the above circumstances was bound to keep the bull secure at his peril, and its escape was negligence for which he was liable.

[Port Arthur, July 24.—O'Connor, J.J.

O'CONNOR, J.J.:—Is the exercise of ordinary, or even extraordinary, care in order to keep a bull from escaping and doing

damage to neighbouring cattle sufficient to exempt the owner from liability for such damage? According to all the authorities cited I cannot come to any other conclusion than that it is not.

In *Fletcher* v. *Reynolds*, L.R. 1, Ex. 279, Lord Blackburn in livering judgment of the full Court used the following language:

"We think that the true rule of law is that the person who for his own purposes brings on his lands and keeps there any thing likely to do mischief if it escapes must keep it at his peril and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape. . . . But for his act in bringing it there no mischief could have accrued and it seems but just that he should at his peril keep it there so that no mischief may accrue or answer for the natural and anticipated consequences. And upon authority this we think is established to be the law whether the things so brought be beasts or water or filth or stenches."

In *May* v. *Burdett*, as quoted in L.R. 1 Q.B.D., Lord Denman sums up the authorities relating to mischievous animals saying: "The conclusion to be drawn from an examination of all the authorities appear to us to be this: that a person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril and that if it does mischief negligence is presumed without express averment."

I must therefore hold that the defendants are liable to the plaintiff for the damage occasioned by the depredation of this bull for which this suit is brought. The damage is claimed on account of the loss that season of a thoroughbred calf. No evidence was given as to whether or not it is customary to have thoroughbred heifers commence to bred at the age of two years. There is authority for holding that the damage was complete at the time of service; but how much damage? I think the possibility of a thoroughbred calf dying as did the scrub calf ought to be considered in estimating the damage. I fix the amount for which the plaintiff will have judgment at fifty dollars together with costs of suit.

O'Flynn, for the plaintiff.

Kehoe, for the defendant.

Province of Nova Scotia.

SUPREME COURT.

Longley, J.] JENNINGS *v.* CHANDLER. [Oct. 29, 1906.

Trespass to land—Claim of title by adverse possession.

Plaintiff and his brother, J., were in joint occupation of the land in question for a period of about 39 years. After they had been in occupation for about nine years J. received a deed of the land and held the title to the land continuously from that time until he conveyed to defendant about two years before the trial of the action. Plaintiff was aware that J. held the legal title and made an admission to that effect to a person who applied to time for permission to overflow a portion of the land. Defendant advanced money to J. who was being pressed by creditors upon J. undertaking to give him a deed of the land.

Plaintiff was aware of this deed being made and offered to join in it if necessary. Defendant on obtaining his deed took formal possession and notified plaintiff of the fact.

Held, that plaintiff was not in a position under these circumstances to assert a title by adverse possession as against defendant, and that his acts after the deed to and the taking possession by defendant were mere acts of trespass.

McLean, K.C., and *Freeman,* for plaintiff. *Paton,* for defendant.

Longley, J.] CONROD *v.* SIMPSON. [Oct. 29, 1906.

Judgment—Action to revive—Interest.

Defendant was arrested and placed in jail under an execution at the suit of plaintiff, and was to have come up before commissioners for examination, but before the time fixed was released from jail by order of the sheriff. In an action to revive the judgment, brought after the death of the sheriff, evidence was given by plaintiff's solicitor to shew that no authority was given by him or by plaintiff for defendant's release and that the same was wholly unauthorized.

Held, 1. The release under these circumstances was in the nature of an escape, and that plaintiff was entitled to succeed in his action.

2. The interest recoverable must be restricted to six years.

Paton, for plaintiff. *McLean*, K.C., and *Freeman* for defendant.

Graham, E.J.] WHITE *v.* ALLEN. [Nov. 12, 1906.

Contract for support—Delivery of deed—Notice.

D. in order to secure the support of himself and his wife in their old age made an arrangement with defendant to live with him and to work his farm for him, and in consideration of dedendant's agreement to do this made a deed of the farm to defendant and deposited it with a justice of the peace to be handed to defendant on the death of D. or to either of the parties with the consent of the other at any time prior thereto.

Subsequently to the making of the deed D. executed a lease of all the timber of a certain size growing upon the land to plaintiff who brought an action against defendant for cutting on the land. The trial judge found that plaintiff through the agents who were employed in the acquisition of the land had notice of the deed to defendant.

Held, 1. There was a contract between D. and defendant which would be enforced equitably against plaintiff and defeat his action.

2. Following *Allen* v. *Dodge* (unreported), that there was a delivery of the deed to defendant, the parties having acted as if there was a formal delivery at the time and as if it were deposited with the justice as security for the performance of the contract.

W. M. Christie, K.C., for plaintiff. *J. B. Kenny*, for defendant.

Townshend, J.] GARDINER *v.* SIMPSON. [Nov. 12, 1906.

Constable—Excessive levy by—Damages.

Defendant levied upon and sold a horse worth about $60, the property of plaintiff for a school rate amounting to $1.25 without making enquiry as to whether or not there was other pro-

perty upon which he could levy. The horse was sold for $15 and was purchased by defendant from the buyer for an advance of fifty cents and was re-sold by him for $55.

Held, that plaintiff was entitled to recover on the ground of excessive distress the amount received by defendant for the horse over and above the amount of the rate and legal expenses. But as plaintiff had exposed himself to the loss he suffered by an attempt to evade or delay payment of the rate, and as he did not after the seizure under the warrant make any effort to pay the legal expenses, he should be deprived of costs.

Hanright and *Knight,* for plaintiff. *Mellish,* K.C., for defendant.

Full Court.] [Dec. 1, 1906.

RE MCBEAN.

Quo warranto—Official elected under Mines Regulation Act, R. S. (1900) *c.* 19—*Estoppel by conduct.*

Motion for leave to file an information in the nature of a quo warranto for the removal from office of a check weighman appointed under the provisions of the Coal Mines Regulation Act, R.S. (1900), c. 19, on the ground that a number of the persons who voted for the official sought to be removed were improperly on the list of voters, not being on the pay sheet of the mine at the time the list of voters was made up.

Held, that the applicant was precluded from taking advantage of the objection, assuming that the list was irregularly made up, owing to the fact that on the present and previous occasions he had assented to the making up of the list in the way now objected to.

Quære, if the case were one in which quo warranto would lie.

J. J. Ritchie, K.C., for application. *W. H. Covert,* contra.

Meagher, J.] [Dec. 11, 1906.

HART *v.* CITY OF HALIFAX.

Costs—Action by party having no title to sue.

Plaintiff brought an action in his own name, without joining the Attorney-General, to compel the repayment of money alleged

to have been illegally paid to the mayor and city engineer of the City of Halifax to reimburse them for expenses incurred as delegates to the convention of the Union of Canadian Municipalities at Winnipeg.

Held, that plaintiff having no title to sue must pay the usual penalty of having costs awarded against him in the absence of misconduct or oppressive conduct in connection with the litigation or leading up to it.

E. P. Allison, for plaintiff. *F. H. Bell,* for defendants.

Graham, E.J.] [Dec. 12, 1906.

FULTON *v.* DAVIDSON.

Boundaries—Uncertainty in description—Presumption.

Where the boundaries of land described in a deed are so uncertain that although they could have been identified at the time they cannot be proved in Court, years after, for want of evidence, but there has been occupation for a long period of time by those claiming under the deed, a confirmatory deed will be presumed.

McKenzie, for plaintiffs. *McLellan,* for defendants.

Full Court.] REX *v.* BURNS. [Dec. 15, 1906.

Bail—Motion to estreat—Notice to surety.

Defendant was arrested on a charge of stealing letters from the post office and was brought before the stipendiary magistrate of the city of H. for examination. At defendant's own request, and with the consent of the prosecuting officer, the examination was adjourned for ten days on condition of defendant giving bail for his appearance. M. as surety entered into a recognizance for that purpose. Defendant failed to appear and notice of the default was given to M. and of application to estreat the bail. When the motion was made objection was taken that no notice had been served upon M. requiring him to perform the condition of the recognizance. The question having been referred to the Court by the judge to whom the application was made,

Held, per TOWNSHEND, J., LONGLEY, J., concurring, RUSSELL, J., dissenting, that such notice was not necessary, the only effect of it being to require the bail to perform an impossible condition.

A. G. Morrison, in support of motion. *J. J. Power,* contra.

Note. In the case of *The Queen* v. *Creelman,* 25 N.S.R. 404, where the same question arose, the majority of the Court, MCDONALD, C.J., WEATHERBE, and HENRY, JJ., held otherwise, RITCHIE and MEAGHER, JJ., dissenting. In a later case, *The Queen* v. *Barrett,* 36 N.S.R. 135, it again arose and the Court was equally divided, MCDONALD, C.J., and GRAHAM, E.J., following the majority opinion in *The Queen* v. *Creelman,* holding that the notice was required, and the other members of the Court, TOWNSHEND and MEAGHER, JJ., holding that it was not.)

Longley, J.] [Dec. 21, 1906.

RE ESTATE OF M. MCDONALD.

Probate Court—Proof of will in solemn form—Taxation of costs —Hearings and attendances—Stenographer.

On taxation of costs in connection with proof of a will in solemn form in the Probate Court the Judge of Probate, following the usual practice in such cases, treated each adjournment as a separate hearing and taxed accordingly, allowing a fee for attendance and a fee for hearing for each morning and afternoon during which the hearing lasted.

Held, that he was wrong in doing so and that the items allowed must be struck out. Also, that in the absence of statutory authority stenographer's fees could not be taxed.

Held, dubitante, that in substitution for the items struck out items for attendance and hearing should be allowed in connection with the taking of evidence and also in connection with the argument.

J. P. Foley, for appeal. *T. R. Robertson,* contra.

Full Court.] [Dec. 22, 1906.

STAMPER *v.* RHINDRESS.

Medical practitioners—Negligence.

Plaintiff who had been severely injured as the result of a fall sought to recover damages from defendants, three medical

men by whom he was attended, for their failure to discover an injury to one of the bones of his left hip and to adopt suitable measures to relieve him of the pain and suffering caused thereby. When defendants were first called to attend plaintiff they found several of his ribs broken and a dislocation of his right hip, and treated him for these injuries. On a subsequent examination his left hip was found to be dislocated and the dislocation was reduced. The left hip became again dislocated some days later and another physician who was then called in and to whom the history of the case was stated inferred that there was a fracture of the rim of the cup or socket, and applied splints as a means of treating this injury. The evidence shewed that at the time defendants made their first and second examinations there was no reason to suspect the existence of this fracture and that it was only when the hip came out again after having been reduced that the existence of the fracture was suspected, and the other treatment adopted.

Held, that there was no evidence of negligence on the part of defendants making them liable in damages.

Drysdale, K.C., A.-G., for appellants. *R. H. Butts*, for respondent.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] REX *v.* DUGGAN. [Oct. 22, 1906.

Criminal law—Crim. Code, s. 503—Wilful making of erasures in voters' list.

Crown case reserved. The accused, having been appointed returning officer for the Electoral District of Selkirk, to hold an election of a member of Parliament at the general elections of 1904, assumed to divide that portion of the district comprising the Provincial Electoral Division of Springfield into polling divisions different from those who had been established under Provincial authority and used at the last preceding election, relying on ss. 22 and 23 of the Dominion Election Act, 1900. He then re-arranged the names on the copies of the voters' lists, sent to

him by the clerk of the Crown in Chancery under s. 21 of the Act, presumably to suit the new divisions and sent to the deputy for polling division No. 3 one of such copies with several names struck out in red ink and certified by him under s. 41 of the Act for use at the election.

Some of the persons whose names had been so struck out tendered their votes at the proper polling place and were not allowed to vote.

The accused was afterwards indicted, under s. 503 of the Criminal Code, 1892, for having wilfully, without legal justification or excuse and without colour of right, made or caused to be made erasures in a voters' list made or prepared according to the law in regard to Dominion elections. At the trial, PERDUE, J., withdrew the case from the jury and directed them to return a verdict of not guilty.

Held, 1. The copy selected by the returning officer, as the one which he intended to certify and forward to the deputy, became at once a voters' list within the meaning of s. 503, of the Code, and it was an offence under that section for him wilfully to erase names of voters from it either before or after he certified it and forwarded it to the deputy.

2. As there were in fact existing polling divisions established under Provincial authority and used at the last preceding Provincial election, the accused was not justified, under ss. 22 and 23 of the Elections Act, in making a new division.

3. The fact that the heading of the list of voters in question contained the words "registration district No. 3," instead of "polling division No. 3," did not justify the accused in believing, if he did believe, that there were no polling divisions, nor could he rely for such belief on the contention that the polling divisions actually established and previously used had not been established in strict accordance with the requirements of the Provincial statutes.

4. A returning officer who wilfully makes such erasures from a voters' list cannot escape punishment on the ground that he had to make them in consequence of having made new polling divisions which he had no authority to make.

5. The trial judge erred in withdrawing the case from the jury, and there should be a new trial.

Aikins, K.C., and *Knott*, for the Crown. *Howell*, for defendant.

Full Court.] WILLIAMS *v.* HAMMOND. [Nov. 22, 1906.

Master and servant—Wrongful dismissal—Insolence as ground of dismissal.

Appeal from judgment of PERDUE, J., noted, 42 C.L.J. 574, dismissed with costs.

Haggart, K.C., for plaintiff. *Pitblado,* for defendant.

KING'S BENCH.

Mathers, J.] [Nov. 23, 1906.

BARTLETT *v.* HOUSE FURNISHING CO.

Jury trial—Illegal seizure—Trespass.

Appeal by defendants from an order of the referee refusing to strike out the plaintiff's jury notice. The statement of claim alleged that the defendants "wrongfully and illegally seized and carried away" certain household furniture from the plaintiff's dwelling house, and claimed damages.

Plaintiff insisted upon trial by a jury, relying on s. 59 of the King's Bench Act, R.S.M. 1902, c. 40, which provides that "action for . . . illegal or excessive seizure . . . shall be tried by jury unless the parties . . . expressly waive such trial."

Defendants contended that what was charged was at most a trespass and relied up sub-s. (b) of the same section which provides that, subject to its provisions, all actions shall be tried by a judge without a jury unless otherwise ordered by a judge.

Held, that an illegal seizure of goods is a trespass although every trespass to goods is not an illegal seizure, for an injury to the goods without seizure might be a trespass. The word "trespass" has a wider meaning than the words "illegal seizure" and it may be that the Legislature intended to limit the right of trial by jury to that particular form of trespass which consists in an illegal seizure, but they certainly have provided for it in the latter case.

Appeal dismissed with costs.

McMeans, for plaintiff. *Stacpoole,* for defendants.

Mathers, J.] [Nov. 26, 1906.

HOLLIDAY *v.* BUSSIAN.

Fire—Negligence.

The findings of fact by the trial judge were that the defendant, who was very shortsighted, which examining a fence on

his own land, observed on the prairie near him a pile of ashes and some partially burned willow roots, that he imagined he saw smoke and moved the ashes with his foot to ascertain whether or not there was fire there. A very strong wind was blowing from the south at the time and it carried burning embers into the dry grass adjoining, which at once took fire. Defendant immediately started to beat the fire out. A few yards away to the north there was a strip of burned ground extending east and west. The defendant succeeded, as he believed, in preventing the fire from spreading and it appeared to him to have burned itself out when it ran up into a pocket in the old burned strip. About an hour afterwards a prairie fire was first observed near the same place. This fire spread to the plaintiff's granaries and consumed them. He sought to recover damages from the defendant, claiming that his loss was caused by the fire started by the defendant under the circumstances above stated, and charging negligence.

Held, that on the facts as found the defendant was not guilty of negligence and the plaintiff could not recover.

Owens v. *Burgess,* 11 M.R. 75, and *Chaz* v. *Les Cisterciens Reformés,* 12 M.R. 30, followed.

Hudson and *Howell,* for plaintiff. *Wilson* and *Haffner,* for defendant.

Full Court.] [Nov. 26, 1906.

JOHNSTON *v.* O'REILLY.

Summary conviction—Certiorari to quash—Want of jurisdiction in convicting magistrate.

Rule nisi to quash a conviction of the applicant under the Liquor License Act, R.S.M. 1902, c. 101. The conviction did not shew on its face where the offence had been committed nor even that it was in the Province of Manitoba.

Held, that the jurisdiction of an inferior Court must appear on the face of the proceedings or it will be presumed to have acted without jurisdiction, and that the conviction must be quashed on the ground that it did not appear from it that the magistrate had jurisdiction.

Held, also, that, notwithstanding the provisions of s. 887 of the Cr. Code, 1892, and the fact that the applicant had taken steps to appeal to the County Court against the conviction, a

certiorari may be properly granted upon any ground which impeaches the jurisdiction of the magistrate.

Reg. v. *Starkey*, 7 M.R. 43, followed.

Ormond, for applicant. *Haggart*, K.C., for prosecutor.

Mathers, J.] [Nov. 26, 1906.

NATIONAL SUPPLY CO. *v.* HORROBIN.

Mechanics' and Wage Earners' Lien Act—Effect on lien of taking promissory note for claim.

The short point for which this case should be noted is that where a contractor or sub-contractor takes a promissory note for or on account of his claim for work done or materials supplied, and discounts such note, he forfeits pro tanto his right to a lien on the building or erection under R.S.M. 1902, c. 110, notwithstanding the provision in sub-s. (c) of s. 24 of the Act, which provides that "the acceptance of any promissory note for . . . the claim shall not merge, waive, pay, satisfy, prejudice or destroy any lien created" by that Act, "unless the lien-holder agrees in writing that it shall have that effect."

The discounting or transferring of a promissory note is not within the protection of the statute. *Edmonds* v. *Tiernan*, 21 S.C.R. 406, followed.

Bowles, for plaintiff. *Whitla* and *Sullivan*, for defendants.

Macdonald, J.] ABELL *v.* HARMS. [Nov. 20, 1906.

Charge on land executed under seal—Implied covenant to pay debt.

Defendant gave plaintiffs a written order for an engine, the price, $700, to be paid on delivery in cash or in lieu thereof "notes on approved security." He afterwards by instrument under seal created a charge or lien on certain land in favour of the plaintiffs for said price and interest to be paid in instalments. The instrument further provided that if notes should be given by defendant for the several instalments, such notes should not be a satisfaction of the said lien and charge, but the same should continue until payment in full of such notes and any

renewals thereof. It contained no covenant or promise to pay the debt. Later defendant gave plaintiffs his notes for the respective instalments.

This action was brought on the notes and also on the sealed instrument to recover the amount of the debt and interest. At the trial, plaintiffs were unable to prove the making of the notes sued on.

Held, that a covenant or provision to pay the debt could not be implied from the terms of the sealed instrument, the effect of which was only to furnish security for the debt on the land. The acknowledgment of the debt and the manner of payment were stated merely as a ground for the giving of such security and the instrument created no personal liability to pay.

Waterous Engine Works Co. v. *Wilson,* 11 M.R. 287, distinguished.

Action dismissed with costs.

Hudson, for plaintiffs. *Phillipps,* for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] [Nov. 6, 1906.

ROLFE *v.* CANADIAN TIMBER CO.

Master and servant—Company—Liquidation of, operating as a discharge of servants.

Plaintiff was engaged as accountant for the defendant company in the spring of 1904. In August of the same year the trustee for the debenture holders seized the company's property, and after transferring to the trustee the books of the company, plaintiff continued in the service of the trustee until November, 1905, when he was dismissed, and brought an action against the company for wrongful dismissal, on the ground that the seizure by the debenture holders was a mere shuffle and that the business was in reality continued by the company.

Held, 1. reversing Forin, Co. J.—That there had been

an actual seizure and, (2) following *Reid* v. *Explosive Company* (1887), 19 Q.B.D. 264, the appointment of a manager and receiver by the debenture holders operated as a discharge of the plaintiff, and he could not recover.

Davis, K.C., for appellants (defendants). *S. S. Taylor,* K.C., for respondent (plaintiff).

Full Court.] [Nov. 7, 1906.

FERNAN *v.* MONITOR & AJAX FRACTION.

Practice—Evidence—Commission—Examination of witness resident out of jurisdiction—Application by defendant.

Plaintiff sued for damages for dismissal and for an alleged breach by defendants of a certain agreement between the parties. Defendants counterclaimed for damages caused by plaintiff through his wilful disobedience, and also charged him with negligence and incompetence. Rossland was chosen as the place of trial. Defendants took out a summons for a commission to issue to take the evidence of one Brockman, defendants' chairman and managing-director, resident in England, and other witnesses there, which summons was dismissed by Forin, Lo. J.S.C., in so far as taking the evidence of Brockman was concerned, on the ground that there was a counterclaim for a large amount, and that Brockman was the intermediary, as mentioned by Chancellor Boyd in *Kidd* v. *Perry* (1892), 14 Pr. 364, and should be examined in open court.

Held, reversing FORIN, LO. J.S.C., that the witness required being the managing-director of the defendant company, and there being no guarantee that the company could get him to come into the jurisdiction, the commission should issue. So far as concerns the counterclaim, the plaintiff, when he brought his action, must have contemplated the probability of that being done.

Davis, K.C., for appellant. *J. A. Macdonald,* K.C., for respondent.

Clement, Co. J.] [Nov. 9, 1906.

VARESICK *v.* BRITISH COLUMBIA COPPER CO.

Master and servant—Workmen's Compensation Act, 1902—"Dependants."

Sec. 8 of Sch. 2 to the Workmen's Compensation Act, 1902, provides for the recording of any award of compensation or of

any matter decided under the Act, in the County Court for the district in which any person entitled to such compensation resides.

Held, on the facts, that the applicants had not proved that they were dependants of the deceased, but,

Semble, the principle governing Lord Campbell's Act, governs in the Workmen's Compensation Act, *viz.*: Given the wrongful act in respect of which the deceased, had he lived, would have had a right of action, the statute intends, in case of death, to make the wrongdoer liable in damages to those who stood to the deceased in any one of the relationships mentioned in the Act.

O'Shea, for applicants. *Hallett*, for respondents.

Bench and Bar.

His Honour WILLIAM HENRY POPE CLEMENT, Judge of the County Court of Yale and judge of the County Court of Kootenay, in the Province of British Columbia: to be a puisné judge of the Supreme Court of British Columbia, in the room and stead of the Honourable Lyman Poore Duff, who has been appointed a puisné judge of the Supreme Court of Canada.—7th December, 1906.

John Robert Brown, of Greenwood, British Columbia, barrister-at-law: to be judge of the County Court of the county of Yale, in the said province, in the room and stead of the Hon. William Henry Pope Clement, promoted to the Supreme Court of this province.

Fred Calder, of Ashcroft, British Columbia, barrister-at-law: to be judge of the County Court of the county of Cariboo, in the said province, in the room and stead of His Honour Clement Francis Cornwall, resigned, 8th Jan., 1907.

F. L. Davidson, Esq., barrister, etc., of Halifax, N.S., has been admitted to the Bar of Ontario, and was sworn in before Mr. Justice Riddell.

Canada Law Journal.

VOL. XLIII. FEBRUARY 15. NO. 4.

COMPANY LAW IN ONTARIO.

Company law in Ontario is inelastic. It has not developed to meet commercial and financial needs. The draughtsmen of the early Acts were no doubt influenced by an idea of paternalism.

Recent inquiries by the Departmental Committee of the British Board of Trade and the Parliamentary Committee of the House of Lords shew that the public is better protected by the greatest freedom in corporate powers accompanied by publicity, or the fullest opportunity for inquiries being made by the investing public in the management and control of company affairs than by limitations and restrictions of company powers and management. Limitations and restrictions lend false security, and merely make the corporation lawyer more expert. The education of the public in inquiry and investigation before investing, and the provision for proper sources of inquiry must do more to assist the investing public than limitations which may be evaded.

The existing statute is largely based upon former Table A. of the Imperial Companies Act with such modifications as are necessitated by change of circumstances and in departmental practice. This is a large limitation of the freedom of company management, and in fact places all regulations for the management of companies on one dead level.

Under the Imperial Act it is otherwise. Table A. applies only when no other provisions are enacted by the company. Not only was the origin inelastic, but has become more so by piecemeal amendments. No better example of this could be instanced than that of the issue and redemption of preference shares. The provisions for redemption were passed to meet particular cases, and again changed to meet others, and are now incapable of general application.

It is now not only in the interests of members of the profes-

sion in Ontario, but it is their duty, to see that the Bill at present before the Legislature is made effective, not only for the purposes of the corporations, but also of the public. Company law has become more specialized, and it is to the profession alone that the Government may look with confidence for suggestions regarding the Bill. No doubt many business men have views upon the subject that are worth considering, but the layman can only express what the result should be, and his means of attaining it are usually ineffective.

The number of special statutes relating to companies has multiplied. It is in the public interest that the multiplication should cease, and that these Acts should be consolidated. This has led to a great increase of the statute law and created legal difficulties as well as anomalies. In the Timber Slide Companies Act are found many provisions relating to the rights and duties of owners of river improvements, which are repeated in the Act respecting Public Property in Rivers and Streams. There are at least four methods of proceeding in cases of expropriation. There are three methods of incorporating companies, and in two of them the record of incorporation is defective, and no means of ascertaining the public to ascertain who may be the officers or what may be the scope of the corporate powers is provided. The Cemetery Companies Act makes proper provisions for the care and protection of cemeteries owned by companies, and the way of interring bodies. There is nothing in the statute law making similar provisions for other cemeteries. The statute overlooks the fact that a cemetery company as a company is no different from another company, but a cemetery is very different from another piece of land.

However, in the consolidation the greatest care should be taken. Many companies have been incorporated under these various Acts which if repealed may leave the companies without means of carrying on their business or perpetuating their existence. For instance, many insurance companies incorporated under the Provident and Benevolent Societies Act are carrying on extensive businesses throughout the province and elsewhere.

The Bill as drawn does not apply to insurance companies, but it repeals the Provident and Benevolent Societies Act. Therefore, as drawn, the Bill leaves this class of company without statutory support. This will no doubt be seen to, but the instance shews why it is necessary that every member of the profession watching the business of such corporations should see that proper provisions are introduced, and that these companies may be enabled to properly carry on their business.

Another instance arises under the Co-operative Associations Act, which is also repealed. A company incorporated under that Act continues its existence under the Companies Act, as provided in the Bill. There is provision in the Co-operative Association Act that business shall not be done on credit. There is no such provision in the Companies Act, and it may be an injustice to many shareholders in such concerns that the corporate character of the company should be thus changed.

Another change of considerable importance is in the character of the report to be given by the directors to the shareholders at the annual meeting, and also the reports to be made to the Government. This opens up a very large question for consideration. On the one hand, it is impossible that the directors of a company should deal with their shareholders' capital without making a report, or by making such a report as gives very little information to the shareholders. On the other hand, it is most irritating and unbusinesslike for directors to whom the control of a company has been committed to be under the espionage of dissatisfied shareholders. There must be some fair position between these extremes, and it is a matter for investigation and discussion to arrive at it. In some of the neighbouring States shareholders have a right at any reasonable time to investigate the business of their company. In others, returns must be made not only of the names of the shareholders and the shares held by them, but also of the assets and liabilities. In some States the details with which these returns are made are set out in the statutes.

Still another innovation is the introduction of the clauses of

the Imperial Act of 1900 relating to the issue of shares for public subscription.

A number of other clauses were introduced at the last session of the Legislature in the Act relating to Prospectuses. That Act seems to have corrected some of the difficulties of the Imperial Act which render that Act practically nugatory, but it still remains to be seen whether any decided advantage has been gained by its enactment. Here the clauses relating to the issue of shares for public subscription are of far greater importance and would no doubt have far greater effect. It is doubtful whether under the financial circumstances of this province these clauses should be adopted in their entirety. On the one hand, there can be no doubt that the public should be protected from improvident flotations. The very want of capital in this province brings about the squander of capital in flotation. On the other hand, restrictive clauses which would work no hardship in England may render the flotation of legitimate enterprises a matter of great difficulty in Ontario.

The sections relating to public utility companies also require the most careful scrutiny. The subject of public ownership is one which is up at the present time. It may be that public ownership and private operation is the most satisfactory solution of the difficulty. Capital should receive every inducement for enterprise. Many corporations now paying large dividends commenced in an humble way. Many of them were experiments, speculations. It is but fair and just that, enterprise should be handsomely rewarded. In a prowing country like this, restrictions on the investment of capital must be disastrous when generally applied to the whole province.

Some franchises which were hastily and improvidently granted a few years ago are now saddled upon the public and are drawing exorbitant and burdensome profits. Here again is a case where the middle and safe position is the one to be strived for. While capital should not be deterred, the incubus should not be created.

It is a matter for consideration whether the brief sections of

this part of the Bill are sufficient. A public utility is not defined. The underlying idea appears to be that where a company through a concession from the Government of the province or from a municipality undertakes a service for the public, greater duties and restrictions should be provided. Provisions for such concessions are to be found in the Municipal Act and other germane enactments. The "unearned increment" is here also a matter for consideration. While capital and private enterprise should have all proper advantage, how far should the interests of the public be conserved when the public make the enterprise profitable.

Corporations have no souls: nevertheless they die. If the Master is not a recording angel he holds the books, and the members of the legal profession take a large part not only in the interest, but in the judgment. The present Ontario Winding-up Act is admittedly useless. It is not even necessary to cite *In re Cosmopolitan Life* to shew this. In so far as companies are concerned the Act regulating assignments and preference appears to be as inadequate. It is questionable whether the winding up part of the Bill will overcome these difficulties. It is for the Court to say whether the machinery provided is sufficient, and if so, there is no reason why a winding-up under the Ontario Companies Act should be superseded by proceedings under the Dominion Winding-up Act.

THOMAS MULVEY.

JUDGES AND EXTRA JUDICIAL BUSINESS.

Mr. Haughton Lennox, member for South Simcoe in the House of Commons, has again introduced with some slight alterations his Bill of last session to amend section 7 of the Act respecting the judges of Provincial Courts, 4 & 5 Edw. VII. c. 31. That section provides that: "No judge mentioned in this Act shall, either directly, or indirectly as director or manager of any corporation, company or firm, or in any other manner whatever, for

himself, or others, engage in any occupation or business other than his judicial duties."

It will be seen that Mr. Lennox's amendment seeks to prevent judges acting as arbitrators or referees, except where they are called upon to act in the performance of duties imposed by the statute or by special appointment from the Crown.

One would have supposed that section 7 above referred to was sufficiently explicit without any amplifications, but it would seem not to be so. Certainly there is such a broad hint given that one might be excused from expressing some surprise that any judge should thereafter think of acting as an arbitrator.

This was clearly the opinion of Hon. Charles Fitzpatrick, the then Minister of Justice, when this section was enacted in 1905. Speaking in reply to Mr. Lennox and others as to the arbitration phase of the question and the effect of section 7, he said: "This amendment to the Act respecting judges will operate as a clear notice that judges are not to be employed in connection with commissions, except where it is important in the public interest they should be so employed. I think the less a judge has to do with matters which are not clearly within the scope of his judicial duties, the better for himself and the dignity of the Bench."

And again Mr. Fitzpatrick during the debate on this subject last March said: "I have up to the present construed the Act that we passed last session very strictly and once or twice judges have applied to me to know whether or not on a true construction of the statute it would be permissible for them to act as arbitrators in dispute between private parties. The answer I have invariably given them is that it is not competent for them to do so, and to-night I regret that I am obliged to deliberately say that the judges of this country have not observed the law passed by Parliament, and that they certainly have not given that example of obedience to the law which we are entitled to expect of them." Mr. Lennox recently obtained an order of the House for all correspondence between the judges and the Department of Justice. When this is brought down it will be seen what argu-

ments have been advanced in favour of permitting the present practice.

Whatever excuse a judge could find for acting as an arbitrator, there surely can be none for his flying directly in the face of section 7 by sitting on a Board of Directors of a company, and so engaging in an occupation or business other than his judicial duties. And yet we see the name of one of the Justices of the High Court of Ontario advertised as being a director of a large trust company. We hope this is a mistake on the part of some official; if so, the mistake should be at once rectified and the name struck off the list.

The Minister of Justice during the debate on a question as to judges participating in business outside their judicial duties is reported in Hansard as having said in answer to a question by a member, "The Government is of the opinion that the judges ought to obey the Act of Parliament. . . . the judges ought to conform to the law." It is difficult to conceive any condition of things that would make such a solemn expression of opinion necessary. Possibly the remark was grimly satirical and intended as a well merited rebuke.

MORE LAW BREAKING IN HIGH PLACES.

In our last issue we gave an illustration of the way in which law makers occasionally become law breakers. A more striking example of this evil tendency is furnished by a recent event in the City of Toronto. On this occasion it was in connection with a change made by the street railway company in certain routes, the legality of which is now sub judice. Whether there was any legal justification for the refusal of the company to comply with the directions of the city engineer to return to the old routes is immaterial. What all law abiding people take exception to is the method adopted by the Council for the purpose of enforcing their claim.

This method was a resolution of the Board of Control instructing the city engineer "to secure from the Board of Police

Commissioners the assistance of the police and such other assistance as may be necessary to compel the railway company to obey his order." The corporation counsel gave his opinion, as might have been expected, that it was "not legal or proper to so use the police force to so compel the running of cars." In this view the Mayor concurred, but the resolution being sent to the Council was passed with only four dissentient voices. On the mandate of the Council being conveyed to the Chief of Police, he refused to act upon it until authorized by the Police Commissioners. After some delay and differences of opinion among the Commissioners, their authorization was obtained and policemen were stationed at various points who forcibly prevented the company from operating their cars on their new routes, popularly known as the "loop lines." As might have been expected the company refused to comply with this demand and withdrew the service from these loop lines. The recently appointed Ontario Railway and Municipal Board thereupon took a hand in the matter and ordered that the company should restore the car service to the loop lines, from which the Council sought to drive them, until the final determination of the question in dispute by the proper tribunal.

Comment on this illegal and high-handed action by the Council might perhaps be thought scarcely needful were it not for the strange lack of discernment by the press and public as to the real nature and vital importance of the issue involved. It simply means that the action of the Council and the Police Commissioners from start to finish was nothing more or less than anarchy in high places, deliberately advised, promoted and carried into effect by those who are sworn and bound above all other members of the community to observe the law. Yet we find a Toronto journal, which has posed for half a century or more as the special champion of constitutional liberty, and takes for its motto in every issue the saying of Junius that "the subject who is truly loyal to the Chief Magistrate will neither advise nor submit to arbitrary measures," advising and encouraging a course of action which the chief magistrate of the chief

city of this province and the majority of the Police Commissioners knew to be illegal, for their own legal adviser told them so. They yielded (weakly, we think) to pressure put on them by irresponsible persons, and adopted a principle which has within it the germ of that worst of all forms of anarchy, which prevails when the ministers of government use the power entrusted to them to aid in the breach of those laws which it is their peculiar privilege and most sacred obligation to honour and maintain. The truth is, the city authorities seem to have been "stampeded" (to use an appropriate prairie expression) by the daily press which unhappily is blindly following the prevailing anarchistic spirit which naturally leads to the disregard of private rights, to communism and to the destruction of the safeguards for law and order.

The delay in filling a vacancy in the Nova Scotia Bench has been the subject of a somewhat acrimonious debate in the House of Commons. This vacancy has existed for about ten months. Much too long a time, by the way. It would not seem unreasonable to remark that if there is no need for this additional judge, it would be well to abolish the seat; if there is, it should be filled. Some member suggested that the Government did not make the appointment for reasons purely political. Not being politicians we cannot suppose that any self-respecting Government would act so improperly. We would rather take for granted that there is some good and proper reason for the delay. Possibly no member of the Nova Scotia Bar can be found who will relinquish his lucrative practice for the beggarly pittance given to judges. To such a one we would say, however, that he ought to be more patriotic. Let him remember Horatius Cocles and his noble self-sacrifice in the brave days of old.

As our readers are aware the committee having in hand the memorial to the late Christopher Robinson have decided "a fitting memorial would be (*a*) a brass tablet with a suitable inscription placed in Osgoode Hall, and (*b*) a scholarship or scholar-

ships founded in connection with the Law Society, to be known as the Christopher Robinson Scholarship." To meet the outlay contributions were asked from the profession not to exceed $5 each. The sum required is about $2,000, and of this over $1,600 has been sent in. It would be well that the remaining sum should be sent in without delay.

A very curious and unique incident is reported in connection with the Northampton Quarter Sessions. It seems that a prisoner was indicted on a charge of arson. The grand jury returned "no true bill," which, through the mistake of the clerk, was read as "a true bill." The prisoner was thereupon put on his trial before the petty jury, and pleaded guilty. While the question of his sentence was under consideration the mistake was discovered and the prisoner was discharged. This raises a question whether, under such circumstances, the prisoner could be tried again on this charge. According to Archbold, where the grand jury throw out a bill, no fresh one can be preferred during the same sessions or assizes but a fresh bill can be preferred at the next session or assizes if in time, or if no time be limited for preferring it; so that it is clear that in an ordinary case the ignoring of a bill is no bar to a subsequent prosecution. But the present case is rather different, because here the prisoner was, notwithstanding the bill was thrown out by the grand jury, actually tried and then discharged.

One of the recently appointed justices of the High Court of Justice of Ontario (as we learn from a Montreal newspaper) during a long and rambling argument handed to his colleagues the following adaptation of Rudyard Kipling's lines:—

"'Oo is it makes that bloomin' noise?" asked Files-on-Parade.
"It's counsel's openin' argument," the color-sergeant said.
"'Oo 'as to 'ear the bally stuff?" asked Files-on-Parade.
"The chief and his two hired men," the color-sergeant said.
"For he doesn't know his law, he misrepresents the facts;
"His logic is so rotten you can see through all the cracks,
"And he's pretty sure to get it where the chicken got the axe,
"When the Court delivers judgment in the morning."

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

LANDLORD AND TENANT — UNFURNISHED HOUSE — DEFAULT OF LANDLORD IN REPAIRING—INJURY TO TENANT'S WIFE BY REASON OF DEFECT IN DEMISED PREMISES.

Cavalier v. *Pope* (1906) A.C. 428. Considering the small amount involved it is somewhat surprising to find that this case has reached the House of Lords. We notice the plaintiff is described as a pauper, it is to be hoped that that sad condition is not the consequence of this litigation. The point involved was a narrow one. The appellant's husband rented an unfurnished house from the defendant, the defendant promised to make some repairs but did not, the appellant owing to the want of repair fell and injured herself. The Court of Appeal decided she could not recover (1905) 2 K.B. 757 (noted, ante, [vol. 42] p. 62), and the House of Lords (Lord Loreburn, L.C. and Lords Macnaghten, James, Robertson and Atkinson), unanimously affirmed the decision.

PRACTICE—DISCOVERY—AFFIDAVIT ON PRODUCTION — CONSPIRACY —CRIMINAL OFFENCE.

National Association of Plasterers v. *Smithies* (1906) A.C. 434 is an important decision by the House of Lords on a question of practice. Smithies brought an action against the National Association of Plasterers for conspiring to induce workmen to break their contract with the plaintiff. The usual order for production of documents by the defendants was made, from which the defendants appealed on the ground that conspiracy being charged they were not liable to make production. The order was affirmed by the Court of Appeal, and the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James, Robertson and Atkinson), on the ground that the fact that though the plaintiff's claim involved a charge of a criminal act, yet that did not per se disentitle the plaintiff to the usual order for production, and it would be for the defendants to shew by their affidavit that their answer to the order would tend to criminate them. But as Lord Macnaghten puts it, the party cannot say in answer to such an order: "I have a bundle of documents; I will not tell you what they are, but I think some of them possibly may tend to criminate me."

COMPANY—SHARE CERTIFICATE FRAUDULENTLY ISSUED BY SECRETARY—FORGERY—MASTER AND SERVANT—SCOPE OF EMPLOYMENT—ESTOPPEL.

Ruben v. *Great Fingall Consolidated* (1906) A.C. 439. This was an appeal from the decision of the Court of Appeal (1904) 2 K.B. 712, (noted, ante, vol. 40, p. 844). The facts were briefly as follows: The appellants had in good faith advanced money to the secretary of the respondent company for his own purposes on the security of a share certificate issued by the secretary certifying that the appellants were duly registered in the company's books as transferee of shares. The certificate was to all appearance in due and proper form, and purported to be duly sealed, and signed by two of the directors. The seal was however, fixed fraudulently, and the signatures of the directors were forged. The action was brought against the company for damages for refusing to register the appellants as owners of the shares. The Court of Appeal dismissed the action, and the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, Davey, James, Robertson and Atkinson), have now affirmed that conclusion.

COMPANY—RESIDENCE—"PERSON RESIDING IN THE UNITED KINGDOM"—COMPANY REGISTERED ABROAD—HEAD OFFICE ABROAD—MEETINGS IN ENGLAND OF DIRECTORS.

De Beers Consolidated Mines v. *Howe* (1906) A.C. 455 is an important decision as to the place of residence of a joint stock company. The company in question was registered abroad and had its head office abroad, but the majority of its directors resided in England and a principal part of its business was transacted in England. The question arose on the claim of the surveyor of taxes to levy income tax on the company in England. The House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James and Robertson), found as a fact that the central control and management of the company was carried on in England, and that England must be deemed its place of residence, where the principal office was, notwithstanding that the head office of the concern was formally in South Africa.

SALMON FISHERY—IMPEDING FREE PASSAGE OF FISH UP A SALMON RIVER BY ABSTRACTION OF WATER—INJUNCTION.

Pirie v. *Kintore* (1906) A.C. 478 was a Scotch appeal in which the plaintiff, who owned a salmon fishery, sought to re-

strain the defendants, who owned a mill on the river, from impeding the passage of salmon up the river by increasing the diversion of the water from its natural channel into artificial channels for the use of their mill. The Court below granted the injunction, and the House of Lords affirmed the judgment.

SHIP—COLLISION—BOTH SHIPS AT FAULT—REOPENING QUESTION OF DAMAGE BY CARGO OWNERS—MERCHANT SHIPPING ACT, 1894 (57 & 58 VICT. c. 60), ss. 503, 504.

Van Eijck v. *Somerville* (1906) A.C. 489 was also an appeal from a Scotch Court in which the House of Lords (Lords Loreburn, L.C., and Lords James, and Robertson), reversed the Court appealed from. That Court had held that where a collision had taken place between two vessels and both ships were at fault, and the question of liability for damages had been settled in an action between the ship owners, it was not open to cargo owners thereafter to re-open the question of the amount of the liability imposed on the vessels respectively, but the House of Lords have reversed the decision holding that the cargo owners were not concluded by the previous adjustment made as between the ship owners to which they were no parties.

PARTNERSHIP—PURCHASE BY TWO PARTNERS WITHOUT KNOWLEDGE OF A THIRD—SCOPE OF PARTNERSHIP—RIGHTS OF PARTNERS.

Trimble v. *Goldberg* (1906) A.C. 494 was an action brought by a partner against his two co-partners in the following circumstances. The partnership was formed for the purchase of buying certain lands for the purpose of speculation. Two of the partners subsequently with their own funds bought certain other lands in the same neighbourhood, and for the like purpose, without giving their co-partner any share therein. There was nothing in the articles of partnership to preclude the partners from making such purchase on their own account. The Supreme Court of the Transvaal had nevertheless held that the purchase must be deemed to have been bought for the benefit of all three partners but the Judicial Committee of the Privy Council (Lords Halsbury and Macnaghten, and Sir A. Wilson and Sir A. Wills), could find no ground of law or equity to support the decision, and it was accordingly reversed.

POLICE PENSION SOCIETY—JUDICIAL DUTY OF DIRECTORS—CLAIM TO PENSION—ADJUDICATION ON CLAIM OF APPLICANT.

La pointe v. *L'Association, etc., de Montreal* (1906) A.C. 535. The plaintiff in this case had been a member of the police force of Montreal and as such a member entitled to the benefits of a police pension fund association of which the defendants were directors. By the rules of the society it was provided that the application for a pension should be fully gone into by the board of directors, and in particular that any member dismissed or obliged to resign from the force, should have his case considered by the board and his right thereto determined by the majority. The plaintiff who had been obliged to resign applied for a pension, but the defendants without any judicial inquiry into the circumstances refused the claim "seeing that he was obliged to tender his resignation." The Quebec Court of King's Bench thought this sufficient, but the Judicial Committee of the Privy Council held that the resolution was wholly void, and remitted the case with directions that the application should be duly considered by a differently constituted board, a right of which the poor ex-policeman would otherwise have been deprived.

POWER OF DOMINION PARLIAMENT—60 & 61 VICT. C. 11, S. 6 AMENDED BY 1 EDW. VII. C 13—VALIDITY OF STATUTE—POWER TO EXPEL OR DEPORT ALIENS.

Attorney-General v. *Cain; Attorney-General* v. *Gilhula* (1906) A.C. 542. The Judicial Committee of the Privy Council (Lords Macnaghten, Dunedin and Atkinson, and Sir Arthur Wilson and Sir H. E. Taschereau), have upheld the validity of the Dominion statute 60 & 61 Vict. c. 11, s. 6 as amended by 1 Edw. VII. c. 13, authorizing the expulsion and deporting of aliens from Canada as therein provided, and overruled the decision of Anglin, J., to the contrary.

BANKER AND CUSTOMER—CHEQUE DRAWN WITH SPACES AFTERWARDS FRAUDULENTLY FILLED UP—LIABILITY OF BANK—DUTY OF DRAWER—NEGLIGENCE.

In *Colonial Bank of Australasia* v. *Marshall* (1906) A.C. 559 the Judicial Committee of the Privy Council (Lords Halsbury, and Macnaghten and Sir Arthur Wilson and Sir Alfred Wills), have adopted and followed the decision of the House of Lords

in *Schofield* v. *Londesborough* (1896) A.C. 514 (noted, ante, vol. 33, p. 65), to the effect that where a bank pays a cheque which a customer has drawn leaving blank spaces which have afterwards been filled up so as to apparently increase the amount of the cheque, the bank cannot charge its customer with such increased amount, and the customer is not guilty of contributory negligence in leaving such spaces, and although a jury found as a fact that the bank could not by the exercise of ordinary care and caution have avoided paying the cheques as altered, and that the cheques were drawn by the plaintiffs in neglect of their duty to the bank; yet the Judicial Committee held that there was no evidence to support such finding of negligence on the part of the plaintiff, and that the High Court of Australia was right in rejecting such finding and giving judgment for the plaintiff.

CROWN LAND IN NEW BRUNSWICK—ADVERSE POSSESSION FOR LESS THAN SIXTY YEARS—GRANT BY THE CROWN DURING ADVERSE POSSESSION—RIGHT OF GRANTEE—21 JAC. I, C. 14—CONSTRUCTION—NULLUM TEMPUS ACT (9 GEO. III. C. 16)—(R.S.O. C. 324, S. 41).

Emmerson v. *Maddison* (1906) A.C. 569 is a New Brunswick case in which the point in contention was whether a grant by the Crown of lands, which at the time of the grant were in the adverse possession of a stranger, but whose possession had been for less than sixty years, was valid. The action was for ejectment against the grantee of the Crown and the plaintiff who claimed title under the prior adverse possession contended that under 21 Jac. I. c. 14, s. 1, the grant was invalid because the Crown had not first established its title by information of intrusion. The Supreme Court of Canada had upheld the validity of the grant, and the Judicial Committee of the Privy Council (Lords Macnaghten, Dunedin and Atkinson and Sir A. Wilson and Sir A. Wills), uphold that conclusion, and they hold that 21 Jac. I. c. 14, s. 1, merely regulates precedure in informations for intrusion (for that reason we may observe it was not included in the third volume of R.S.O.), but in nowise prevented the Crown from making a grant of lands in the adverse possession of a stranger, or of preventing the grantee from taking and maintaining peaceable possession thereunder. The decision of the New Brunswick Courts to the contrary were overruled. That case practically affirms the decision in *Doe d. Fitzgerald* v. *Finn*, 1 U.C.Q.B. 70.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] [Nov. 8. 1906.

CITY OF HAMILTON *v.* HAMILTON DISTILLERY CO.

Appeal—Action for declaration and injunction.

The Act 60 & 61 Vict. 34 (d), relating to appeals from the Court of Appeal for Ontario does not authorize an appeal in an action claiming only a declaration that a municipal by-law is illegal and an injunction to restrain its enforcement.

A by-law providing for a special water rate from certain industries does not bring in question the taking of an annual or other rent, custom or other duty or fee under s. (d) of the Act.

Blackstock, K.C., and *Rose*, for appellants. *Shepley*, K.C., and *Bell*, for respondents.

Ex. Ct.] DODGE *v.* THE KING. [Nov. 15, 1906.

Expropriation of land — Payment — Market value — Potential value—Evidence.

D. purchased at different times and in sixteen different parcels 623 acres of land, paying for the whole nearly $7,000, or about $11 per acre. The Crown, on expropriating the land, offered him $20 per acre, which he refused, claiming $22,000, which on a reference to ascertain the value was increased to $45,000. The Referee allowed $38,000, which the Exchequer Court reduced to the sum first claimed.

Held, reversing the judgment of the Exchequer Court, 10 Ex. C.R. 208, Girouard, J., dissenting, that there was no user of the land nor any special circumstances to make it worth more than the market value, which was established by the price for which it was sold shortly before expropriation.

D. claimed the larger price as potential value of the land for orchard purposes, to which he had intended to devote it.

Held, that as he had not proved the land to be fit for such

purpose, and the evidence tended to disprove it, he could not receive compensation on that ground.

By 2 Edw. VII. c. 9, s. 1, only five expert witnesses can be called by either side on the trial of a case.

Quære, if more are called without objection by the opposite party is the testimony of the extra witnesses valid?

Appeal dismissed, and cross-appeal allowed with costs.

Roscoe, K.C., for appellant. *Newcombe*, K.C., and *MacIlreith* for respondent.

Que.] COTE *v.* RICHARDSON. [Nov. 19, 1906.

Appeal—Intervention—Amount in controversy.

In an action in the Province of Quebec to recover $804.49, a writ of attachment before judgment issued at the same time as the writ of summons, and goods in possession of the defendant, of the value of $4,000 were provisionally attached. The respondent company subsequently intervened in the action claiming the goods thus attached. The judgment maintained the plaintiff's action, quashed the attachment, maintained the intervention, and declared that the company were owners of the goods. On motion to quash an appeal by the plaintiff,

Held, Girouard, J., dissenting, that the intervention was a "judicial proceeding" within the meaning of section 29 of "The Supreme and Exchequer Courts Act," and that the right of appealing to the Supreme Court of Canada was determined by the matter in controversy upon the intervention. *Turcotte* v. *Dansereau*, 26 S.C.R. 578, and *King* v. *Dupuis*, 28 S.C.R. 388 followed. *Atlantic, etc. Ry Co.* v. *Turcotte*, Q.R. 2 Q.B. 305. *Allan* v. *Pratt*, 13 App. Cas. 780, and *Kinghorn* v. *Larue*, 22 S.C.R. 347, distinguished. Motion to quash dismissed.

Flynn, K.C., for appellant. *Stuart*, K.C., and *Garneau*, K.C., for respondent.

Que.] [Nov. 22, 1906.

QUEBEC NORTH SHORE TURNPIKE ROAD *v.* THE KING.

Crown—Purchase of debentures—Illegal purpose—Breach of trust.

In an action by the Crown to recover interest due upon debentures purchased by the Government of the late Province

of Canada with moneys belonging to the Common School Fund, (of which the Crown is trustee), from the Quebec North Shore Turnpike Road Trustees, the defendants pleaded that the debentures could not be lawfully held or recovery had thereon inasmuch as the advisers of the Crown, at the time of their purchase, were aware that the debentures had been issued in breach of trust and their proceeds misapplied towards payment of interest on other debentures due by them.

Held, that, as there was statutory authority for the issue of the debentures in question, knowledge of any breach of trust, or misapplication of moneys in respect thereto, by such advisers of the Crown could not be set up by the defendants as a defence to the action. Appeal dismissed with costs.

Lafleur, K.C., and *Stuart* K.C., for appellants. *Shepley,* K.C., for respondent.

Que.] MOREL *v.* LEFRANCAIS. [Nov. 23, 1906.

Contract—License to cut timber—Description of land—Boundaries—Winding river—Ambiguity.

A license to cut timber on lands traversed by a water-course described the portion on which the timber was to be cut as "bounded on the south" by the river. The river crossed the width of the land almost entirely at a point about seven arpents from its northern boundary, and again crossed it completely at another point about nineteen arpents further south.

Held, that there was no ambiguity in the description, but even if any doubt existed, the language of the instrument must be construed literally, and the party bound thereby could not be allowed to give evidence of extraneous circumstances to shew a different intention. Appeal allowed with costs.

C. E. Dorion, K. C., for appellant. *L. P. Pelletier,* K.C., for respondent.

Ont.] WABASH RAILROAD CO. *v.* MISENER. [Dec. 11, 1906.

Negligence—Railway company—Findings of jury—"Look and Listen."

M. attempted to drive over a railway track which crossed a highway at an acute angle where his back was almost turned to

a train coming from one direction. On approaching the track he looked both ways, but did not look again just before crossing when he could have seen an engine approaching from behind which struck his team and he was killed. In an action by his widow and children the jury found that the statutory warnings had not been given, and a verdict was given for the plaintiffs and affirmed by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal, (12 O.L.R. 71), Fitzpatrick, C.J., hesitante, that the findings of the jury were not such as could not have been reached by reasonable men and the verdict was justified. Appeal dismissed with costs.

Rose, for appellants. *German*, K.C., for respondents.

Ont.] [Dec. 11, 1906.

HAMILTON STREET RAILWAY CO. *v.* CITY OF HAMILTON.

Municipal corporation—Use of streets by electric railway—Payment for—Percentage of receipts—Traffic beyond city.

By agreement between the City of Hamilton and the Hamilton Street Railway Co. the latter was authorized to construct its railway on certain named streets and agreed to pay to the city, inter alia, certain percentages on their gross receipts.

Held, following *Montreal Street Ry. Co.* v. *City of Montreal*, (1906) App. Cas. 100, that such payment applied in respect to all traffic in the city, including that originating or terminating in the adjoining Township of Barton.

2. As when the railway was extended into Barton the company agreed with that township to carry passengers from there into the city at city rates, the percentage was payable on the whole of such traffic and not in the portion within the city only.

3. The power of the company to construct its railway was not derived wholly from its charter but was subject to the permission of the city corporation, the city had therefore a right to stipulate for payment of such percentages and the agreement therefor was intra vires. Appeal dismissed with costs.

Nesbitt, K.C., and *Armour*, K.C., for appellants. *Blackstock*, K.C., and *Rose*, for respondents.

Y. T. C.] [Dec. 11, 1906.

KLONDYKE GOVERNMENT CONCESSION *v.* MCDONALD.

Mining lease—Hydraulic grant—Legislation—Riparian rights.

An hydraulic mining lease, granted in 1900, under the Dominion Mining Regulations, for a location extending along both banks of Hunker Creek, in the Yukon Territory, included a point at which, in 1904, the plaintiff acquired the right to divert a portion of the waters of the creek, subject to then subsisting rights, for working his placer mining claims adjacent thereto.

Held, that the hydraulic grant was governed by the provisions of the Mining Regulations in respect to the user of flowing waters and conferred no priority as to privileges or riparian rights upon the lessee whereby the plaintiff could be prevented building dams and flumes for the diversion of the waters of the creek at the point mentioned, for the purpose of working his placer claims, as his grant was of a substantive user of those waters and not subject to the common law rights of riparian owners on the stream. Appeal dismissed with costs.

Ewart, K.C., and *Chrysler,* K.C., for appellants. *Auguste Noel,* for respondent.

Ex. Ct.] PAUL *v.* THE KING. [Dec. 11, 1906.

Negligence—Navigation of inland waters—Collision—Government ships and vessels—"Public Work"—Exchequer Court Act, section 16*—Construction of statute—Right of action.*

His Majesty's steamship "Champlain" while navigating the River St. Lawrence at some distance from a place where dredging was being carried on by the Government of Canada, and engaged in towing an empty mud-scow, owned by the Government, from the dumping ground back to the place where the dredging was being done, came in collision with the suppliant's steam-barge, which was also navigating the river, and the barge sustained injuries.

Held, affirming the judgment of the Exchequer Court of Canada, that there could be no recovery against the Crown for damages suffered in consequence of negligence of officers or servants, as the injury had not been sustained on a public work within the meaning of the sixteenth section of "The Exchequer Court Act." *Chambers* v. *Whitehaven Harbour Commissioners,*

(1899) 2 Q.B. 132; *Hall* v. *Snowdon*, (1899), 2 Q.B. 136; and *Lowth* v. *Ibbotson*, (1899), 1 Q.B. 1003, referred to.

Appeal dismissed with costs.

Mignault, K.C., and *Martineau*, K.C., for appellant. *Newcombe*, K.C., and *Decarie*, K.C., for respondent.

Ex. Ct.] SS. ARRANMORE *v.* RUDOLPH. [Dec. 26, 1906.

Shipping—Collision—Violation of rules not effecting accident—Steering wrong course.

The Supreme Court will not set aside the finding of a nautical assessor on questions of navigation adopted by the Local Judge, unless the appellant can point out his mistake and shew conclusively that the judgment is entirely erroneous. *The Picton*, 4 S.C.R. 648, followed.

A steamer coming up Halifax Harbour ran into a schooner striking her stern on the port side. No sound signals were given. The green light of the schooner was seen on the steamer's port bow, and the latter starboarded her helm to pass astern and then ported. He then was so close that he stopped the engines, but too late to prevent the collision.

Held, that though under the rules the schooner should have kept her course and also was to blame for not having a proper look-out, neither fault contributed to the collision. Appeal dismissed with costs.

Harris, K.C., and *Mellish*, K.C., for appellants. *W. B. A. Ritchie*, K.C., for respondents.

Davies, J.] THE KING *v.* GILBERT. [Feb. 1.

Criminal law—Extension of time for notice of appeal—Jurisdiction.

The power given by s. 1024 of Crim. Code (R.S.C., 1906, c. 146) to a judge of the Supreme Court of Canada to extend the time for the service on the Attorney-General of notice of an appeal in a reserved Crown case, may be exercised after the expiration of the time limited by the code for the service of such notice. *Banner* v. *Johnston*, L.R. 5 H.L. 157, and *Vaughan* v. *Richardson*, 17 S.C.R. 703, followed.

Bethune and *Balfour*, for the application.

Province of Ontario.

COURT OF APPEAL.

Full Court.] McCarthy *v.* Kilgour. [Nov. 3, 1906.

Master and servant—Injury to servant—Negligence—Defect in machine—Workmen's Compensation Act.

The plaintiff, seventeen years of age, was employed by the defendant, a paper box manufacturer, to work a machine for cutting cardboard used in making boxes. The machine was controlled by a lever which worked on a horizontal plane three or four inches wide, the machine being at rest when the lever was at the centre of this plane, which was called neutral, and was put in motion or stopped by the pushing the lever from or drawing it to neutral. While working the machine a piece of cardboard missed the guides which kept it in position, and to enable the plaintiff to place it in proper position, he attempted to stop the machine, when, as he claimed, by reason of the absence of a catch or clutch at neutral to stop the lever, or by reason of the lever being too loose, the lever went too far and the plaintiff's hand was caught and injured. No complaint had heretofore been made as to the working of the machine, nor had there been any prior accident, the expert evidence shewing there was nothing amiss in the working of it, or any defect to be remedied: while the finding as to the cause of the accident was on the evidence, a mere matter of conjecture. A verdict for the plaintiff was therefore set aside, and the action was dismissed with costs.

DuVernet, and *Greer*, for appellant. *McBrady*, K.C., for respondent.

Full Court.] Macoomb *v.* Town of Welland. [Jan. 22.

Highway—Dedication—User by public—Action—Parties—Attorney-General.

In an action for a declaration that a portion of the river road lying between Burgar and Dorothy Streets, in the Town of Welland, was not a highway, but the private property of the plaintiffs,

Held, reversing the judgment of Anglin, J., 12 O.L.R. 362,

that the evidence did not establish dedication, and that the plaintiffs were entitled to succeed.

Held, also, that the Attorney-General was not a necessary party.

Lynch-Staunton, K.C., *Douglas*, K.C., and *T. D. Cowper*, for plaintiffs (appellants). *Armour*, K.C., for the defendants.

Full Court.] [Jan. 22

NORTHERN ELEVATOR CO. *v.* LAKE HURON AND MANITOBA MILLING CO.

Contract—Construction—Sale of wheat—Correspondence by telegraph—Price of wheat—Ascertainment by reference to quotations—Evidence—Trade usage or custom.

On the 22nd May, 1903, the plaintiffs, grain merchants at Winnipeg, Manitoba, telegraphed to the defendants at Goderich, Ontario: "Referring to my telegram we offer subject to immediate reply by telegraph one cargo, about eighty thousand bus., part number one hard, three over part number two Northern, one- quarter under New York July c.i.f. Goderich in ten days; terms twenty-five thousand sight draft, balance weekly payments as suggested int. and ins. Goderich paid by you as before if you wish will fix price to-day's close hard eighty-two cents two Northern seventy-eight and three-quarters; telegraph immediately whether you accept or not; can give you more two Northern than one H." The defendants telegraphed to the plaintiffs on the next day: "We accept half one hard, half two Northern, price fixed date shipment or sooner." Five days later the plaintiffs telegraphed to the defendants: "Probably send Algonquin to-morrow takes about fifty-eight thousand two Northern, thirty-seven thousand one hard, do you want the surplus fifteen thousand two Northern one-half under July, telegraph immediately on receipt." And on the same day the defendants telegraphed to the plaintiffs: "We accept, will provide insurance here, see to-day's letter." The 95,000 bushels mentioned were shipped and received by the defendants, and, a dispute having arisen as to the price, the plaintiffs withheld the bill of lading for 10,000 bushels of the 95,000 and the defendants having, notwithstanding the absence of the document, taken the 10,000 bushels, the plaintiffs brought this action for conversion thereof, or alternatively for the balance of the price. The defendants maintained that the price was paid in full:—

Held, that there was a complete contract for the sale of the goods in question, at a price to be fixed, on or before the date of shipment, by reference to New York quotations; and that the words used by the plaintiffs "three over . . . one-quarter under New York July," had not the effect of importing into the contract a term in accordance with a custom or trade usage of the wheat market at Winnipeg, of which evidence was given at the trial subject to objection, that the buyer was bound to sell a similar quantity of New York wheat to the original vendor.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

J. H. Moss, and *F. Aylesworth*, for plaintiffs (appellants). *W. Proudfoot*, K.C., and *Skeans*, for defendants.

Full Court.] LOVELL *v.* LOVELL. [Jan. 28.

Supreme Court of Canada—Leave to appeal—Special grounds—Dissenting judgments.

Leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal, (See 42 C.L.J. 356) was refused the majority of the Court holding that it was not necessary to consider, upon an application for leave, the question whether an appeal would lie without leave, and being of opinion that no special reasons were shewn for granting leave, the circumstance that out of the nine judges of the Provincial Courts who heard the case two dissented from the opinion of the majority, not being a special ground.

MEREDITH, J.A., dissenting, was of opinion that an appeal lay without leave, and therefore the Court of Appeal had no jurisdiction to entertain the application for leave; but that, if there were jurisdiction, the leave should be granted.

Watson, K.C., for applicant, the defendant. *King*, K.C., for plaintiff.

HIGH COURT OF JUSTICE.

Garrow, J.A.] [Nov. 5. 1906.

STEPHENS *v.* TORONTO RY. CO.

Appeal—Divisional Court—Leave to appeal from to Court of Appeal—Practice—Scale of costs—Conflicting decisions.

In an action claiming $1,000 damages for an accident through the defendants' alleged negligence, the defendants denied any

liability but with their statement of defence they paid into Court $150 in full of the plaintiff's claim, if any. This the plaintiff accepted in full satisfaction of her claim, and delivered a bill of costs on the High Court scale, which the taxing officer allowed, and granted her a certificate, though objected to by the defendants, who contended that costs only on the County Court scale should have been taxed. Appeals by the defendants to a judge in Chambers and to a Divisional Court having been dismissed, the defendants then moved for leave to appeal to the Court of Appeal.

Held, that the matter being of importance, and in view of the conflicting opinions in *Chick* v. *Toronto Electric Light Co.* (1887), 12 P.R. 58, and the later case of *Babcock* v. *Standish* (1900) 19 P.R. 195, in which the former decision was apparently not referred to, the leave should be granted, but only on the defendants paying the costs of the motion, and of the appeal to the Court of Appeal.

D. L. McCarthy, for appliant.

Divisional Court.] CRAWFORD *v.* TILDEN. [Nov. 5, 1906.

Mechanics' lien—Railway—Dominion Act—Constitutional law.

The Mechanics' Wage Earners and Lien Act, R.S.O. 1897, c. 153, does not apply to a railway company incorporated under a Dominion Act and declared thereby to be a company incorporated for the general advantage of Canada.

Dickinson, Proudfoot, K.C., and *A. H. McDonald,* K.C., for the various parties.

Boyd, C.—Trial.] [Dec. 1, 1906.

THOMSON & AVERY *v.* MACDONNELL.

Insurance—Assignment of policy—Informal assignment—Security for debt—R.S.O. 1897, *c.* 203, *s.* 151(5).

The holder of a policy of insurance intending to secure payment of a loan to him, signed a document addressed to the lenders in which he stated "for collateral security I have placed aside and assigned to you a policy of insurance in the Standard Life Assurance Company for $2,000."

Held, that the effect of the above document was to give the

equitable right and title to the policy to the lenders of the money; and that other creditors could not claim as against them for they could take no higher rights than the insured had at the time of his death.

F. H. King, for plaintiffs. *J. M. Farrell,* for defendant.

Garrow, J.A.] [Dec. 3, 1906.

PRESTON *v.* TORONTO RY. CO.

Damages—Abandonment of portion of damages—Claim held to be limited to balance—Appeal to Privy Council—Application therefor refused.

The plaintiff may in a Superior Court suit at any time abandon a part of his claim, and upon such abandonment the remainder only, is deemed to be in controversy.

On the trial of an action in which the damages were laid at $5,000, a nonsuit was entered, but it was agreed that in case the plaintiff should on appeal be held entitled to maintain the action, the damages should be fixed at $1,000. On appeal to a Divisional Court, the plaintiff was held so entitled, and a new trial was directed unless the defendants consented to judgment for the plaintiff for the $1,000. This the defendants refused to do and appealed to the Court of Appeal when the judgment of the Divisional Court was affirmed. An application was then made for leave to appeal to the Privy Council, on the ground that the matter in controversy exceeded $4,000. In answer thereto the plaintiff, by affidavit, stated that he was only claiming 01,000, which he regarded as agreed upon for all purposes.

Held, that the application must be refused, for that the damages must be deemed to be limited to the $1,000; but in drawing up the order the fact of the abandonment of the excess should be stated.

Leighton McCarthy, K.C., for applicants. *Shirley Denison,* contra.

Divisional Court.] [Dec. 4, 1906.

CLARK *v.* UNION STOCK UNDERWRITER CO.

Bills and notes—Absence of consideration—Evidence—New trial.

In an action upon two promissory notes for $3,000 and $4,000, respectively, the defendants set up want of consideration

and that the plaintiff was not a bonâ fide holder for value. At the trial the defendants tendered evidence to show that the notes were given merely as receipts for stock which had been delivered to defendants for sale, that there was no consideration for the notes, and that the plaintiff who was a clerk in the office of the plaintiffs' solicitors had given no value therefor; also that a written agreement for the transfer of the stock made between the plaintiffs and one of the defendants' firm had never been acted upon, or had been abandoned.

Held, that whether or not evidence was admissible to shew that the notes were given as receipts, the defendants were entitled to give in evidence all the facts which would tend to establish want of consideration, and this having been denied them a new trial was directed.

Watson, K.C., and *Medd*, for plaintiff. *Rose* for defendants.

Divisional Court.] GUNN *v.* TURNER. [Dec. 7, 1906.

Vendor and purchaser—Contract—Specific performance—Title —Recital more than twenty years old—Onus of proof.

A deed more than twenty years old, by which certain lands were conveyed to the grantee in fee, contained the recital that the grantee was the administrator of his father's estate, and that the land was conveyed to him in satisfaction and discharge of a debt due to his father. It appeared that some four years prior thereto, letters of administration ad litem had been granted by a Surrogate Court to the father's widow. In an action brought for specific performance of a contract for the sale of the said land.

Held, that such recitals were sufficient evidence of the facts so recited, and were not displaced by the fact of the prior grant of administration to the widow for a limited purpose stated.

Judgment of Teetzel, J., at the trial affirmed.

H. S. Osler, K.C., for plaintiff. *Ritchie*, K.C., and *A. Hoskin*, K.C., for defendant.

Falconbridge, C.J.K.B., Britton, J., Riddell, J.] [Dec. 12, 1906.

RE TAYLOR *v.* REID.

Prohibition—Division Court—Acceptance of goods—Cause of action—Statute of Frauds—Jurisdiction.

In an action for $45 the price of a coat ordered by the defendant in Toronto to be made and sent by the plaintiff to him at Belleville by express,

Held, that the plaintiff must prove as part of his case an acceptance of the coat at Belleville and that certain letters written by defendant at Belleville to the plaintiff at Toronto while evidence from which acceptance might be inferred were not the acceptance itself; and as the plaintiff failed to do this the whole cause of action did not arise at Toronto within the jurisdiction of the Division Court in which the plaint was brought, prohibition must issue.

Judgment of Teetzel, J., affirmed.

Clute, for the appeal. *Grayson Smith,* contra.

Falconbridge, C.J.K.B.] [Dec. 28, 1906.

REX EX REL. BURKE *v.* FERGUSON.

Factories Act—Privies—"Factory"—"Owner."

Held, that a store occupied by persons carrying on the business of merchant tailors, the rear part of the building being used as a tailoring department and the front part as a sales department, 14 persons being employed in the tailoring department, was a "factory" as defined by s. 2, ss. 1, cl.c. of the Ontario Factories Act, R.S.O. 1897, c. 256, and the amendments thereof.

Held, also, that under s. 15, as amended by 4 Edw. VII. c. 26, s. 3, which provides that the "owner" of every factory shall provide a sufficient number of . . . privies, etc., the owner of the building, is plainly intended, who may or may not be also the employer.

J. D. Davidson, for defendant.

Cartwright, K.C. and *McCrimmon,* for the Attorney-General and inspector of factories.

Boyd, C., Maclaren, J.A., Mabee, J.] [Jan. 14.

EMPEY *v.* FICK.

Parent and child—Conveyance of farm by father to daughters—Agreement for maintenance—Action to set aside transaction—Understanding and capacity of grantor—Lack of independent advice—Absence of undue influence.

A farmer, 77 years old, conveyed his farm to two of his daughters, subject to a charge for the maintenance of himself and his wife and of a money payment to another daughter. The evidence shewed that he understood what he was doing and approved of it afterwards till his death four years later. This action was brought by one of his sons, after his death, to set aside the conveyance to the defendants, the two daughters.

Held, that the transaction was a righteous one, and that the conveyance, being executed voluntarily and deliberately with knowledge of its nature and effect, should not be set aside; the advice of an independent solicitor or other person was not a sine qua non, it appearing that the traction was not promoted or obtained by undue influence, and was in itself a reasonable one, having regard to all the circumstances.

Judgment of CLUTE, J., reversed.

Douglas, K.C., and *W. C. Brown,* for defendants (appellants). *J. S. MacKay* and *R. McKay,* for plaintiff.

Boyd, C., Maclaren, J.A., Mabee, J.] [Jan. 15.

BOHAN *v.* GALBRAITH.

Vendor and purchaser—Contract for sale of land—Specific performance — Correspondence — Offer — Quasi-acceptance — Agent.

The defendant, the owner of land in Ontario, being abroad, arranged with an estate agent to send him any offers of purchase which he might receive. The plaintiff filled up and signed a printed form offering $13,000, naming terms of payment and other details. This was sent by the agent to the defendant, who refused it. The plaintiff then signed another offer of $14,000, on a similar form, half cash, balance payable by instalments, offer to be accepted by a certain day, and sale to be completed by a certain day. This was sent by the agent to the defendant, who,

upon receiving it, wrote to the agent a letter in which he intimated that he would take $14,000 in cash. In reply the agent, on instructions from the plaintiff, wrote to the defendant informing him that the plaintiff accepted the terms and would pay the $14,000 in cash. On receipt of this letter, the defendant drew up an offer at $14,000, containing the same terms as the offer at $13,000, and forwarded it for signature by the plaintiff. This was signed by the plaintiff and sent to defendant, who then wrote to the agent declining to accept it.

Held, in an action for specific performance, that no contract binding upon the defendant could be made out from the documents and correspondence.

Harvey v. *Facey* (1903) A.C. 552 followed.

Judgment of TEETZEL, J., reversed.

J. A. Paterson, for plaintiff. *Middleton,* for defendant.

Boyd, C., Maclaren, J.A., Mabee, J.] [Jan. 15.

F. T. JAMES CO. *v.* DOMINION EXPRESS CO.

Carriers—Express company—Contract to forward perishable goods—Delay in transmission—Gross negligence—Railway company—Agent or servant—Notice of claim for damage to goods—"At this office."

The defendants undertook to forward a consignment of fish from Selkirk, Manitoba, to Toronto, Ontario, subject to certain conditions expressed in the contract.

Held, that the defendants' engagement implied that a safe and rapid transit would be furnished for the whole distance, and that contract was broken when the perishable goods were transferred to a freight train at Winnipeg by which delivery was delayed; and this was negligence for which the defendants were liable as common carriers.

A special condition that the defendants should not be liable for loss or damage unless it should be proved to have occurred from the gross negligence of the defendants or their servants, did not avail the defendants, because the railway companies were to be regarded as the defendants' servants, and the negligence was to be accounted gross negligence.

Another condition was that a claim for loss or damage should be presented to the defendants in writing "at this office."

Held, that presentation at the head office of the defendants satisfied this requirement.

Judgment of CLUTE, J., affirmed.

W. Nesbitt, K.C., and *Shirley Denison*, for defendants (appellants). *Shepley*, K.C., and *G. H. D. Lee*, for plaintiffs (respondents).

Mulock, C.J. Ex.D., Anglin, J., Clute, J.] [Jan. 18.

STILL *v.* HASTINGS.

Malicious prosecution—Absence of reasonable and probable cause—Functions of judge and jury—Disputed facts—Nonsuit—New trial—Judicature Act, s. 112*—Questions for jury.*

In an action for malicious prosecution the jury is to find the facts on which the question of reasonable and probable cause depends, but the judge must determine whether the facts found do constitute reasonable and probable cause. The difficulty is in the determination of the question whether there are any facts in dispute upon which the jury should be asked to pass. In determining that the plaintiff has failed to shew absence of reasonable and probable cause, and withdrawing the case entirely from the jury, the judge must assume in favour of the plaintiff all facts of which he has adduced any reasonable evidence.

Therefore, where the defendant had prosecuted the plaintiff for the theft of some lumber, and the plaintiff admitted taking the lumber, but swore that he had done so with the defendant's consent, in exchange for lumber of his own,

Held, that it must be assumed that the exchange was actually made, and belief of the defendant, when laying the information, in the guilt of the plaintiff, necessarily implied his having forgotten that he had made such an exchange, and such forgetfulness not being admitted, was a question of fact for the jury, and so too the existence in the mind of the defendant of an honest belief in the plaintiff's guilt.

The plaintiff admitted that the defendant, before laying information, charged him orally with the theft of the lumber, and that he (the plaintiff) made no answer to the charge, no allusion to the exchange.

Held, that these facts did not warrant an assumption by the trial judge that the plaintiff's evidence as to the exchange was untrue, or his drawing an inference that, if any such exchange

had in fact taken place, it had passed entirely from the defendant's mind.

Judgment of MABEE, J., nonsuiting the plaintiff set aside, and a new trial directed.

Semble, per ANGLIN, J., that sec. 112 of the Judicature Act expressly prohibits the putting of questions to the jury in actions of this kind and of the other kinds specified therein. Suggestion of an amendment of this section.

D. O'Connell, for plaintiff. *R. McKay,* for defendant.

Mulock, C.J. Ex. D., Anglin, J., Clute, J.] [Jan. 25.

BRENNER *v.* TORONTO R.W. Co.

Negligence—Contributory negligence—"Ultimate" negligence—Street railway—Injury to person crossing track—Neglect of motorman to shut off power on approaching crossing—Rule of company—Withdrawal from jury—Misdirection.

Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute "ultimate" negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. Such anterior default of the defendant is "ultimate" negligence when it renders inefficient to avert injury to the plaintiff means employed by the defendant after danger became apparent, and which would otherwise have proved adequate to prevent the mischief, or renders the defendant wholly incapable of employing such means, though time was afforded for his using them efficaciously, but for such disabling negligence.

Scott v. *Dublin and Wicklow R.W. Co.* (1861) 11 Ir. C.L.R. 377, approved. *Radley* v. *London and North-Western R.W. Co.* (1876) 1 App. Cas. 754, applied.

The plaintiff in crossing a city street in front of an approaching motor car of the defendants was admittedly guilty of negligence or contributory negligence, but, on the evidence, would have crossed safely if a moment more had been allowed her. As it was, she was struck by the corner of the car fender and injured. There was evidence of a rule of the defendants that motormen were to shut off power at a certain distance before reaching a

crossing, and that the motorman on this occasion did not do so, and in an action for the defendants' negligence causing the plaintiff's injuries the trial judge in his charge to the jury withdrew the evidence of this rule from their consideration.

Held, that the place where the plaintiff attempted to cross was a crossing, being opposite a street running at right angles to the street upon which the car was being operated, though not an intersecting street; and the withdrawal of the evidence as to the rule was misdirection, and misdirection which might have affected the result; the jury might, upon the evidence, have found that, but for the motorman's failure sooner to shut off power, or to reduce speed, the momentum of the car would have been so lessened that he could, with the emergency appliance at his command, have avoided running down the plaintiff; and this failure, though anterior to the plaintiff's negligence, would be "ultimate" negligence, within the meaning of the rule which makes a defendant liable, notwithstanding contributory negligence of the plaintiff, if in the result he (the defendant) could by the exercise of ordinary care have avoided the mischief.

W. R. Smyth, for plaintiff. *W. Nesbitt*, K.C., and *D. L. McCarthy*, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Dec. 22, 1906.

SMITH *v.* FRAME.

Bills and notes—Consideration—Forbearance—Collection Act—Salary of Government official.

Plaintiffs recovered judgment against defendant and obtained an order from a commissioner of the Court, under the Collection Act, after examination for payment of the debt by instalments. Defendant paid the instalments for a time as required by the order and then failing to pay an order was obtained under the Act for an execution to take the body. Defendant having been arrested applied to a judge of the Court under the Judgment Debtors Act for his discharge. After a partial hearing the mat-

ter was adjourned to a later date for further consideration and on the recommendation of the judge in favour of a settlement defendant gave the promissory note sued on.

Held, that the forbearance by plaintiffs in respect to their judgment, and in respect to asking for a remand constituted good consideration for the making of the note.

At the time of the making of the commissioner's order for payment by instalments defendant was in the employ of the Dominion Government as Inspector of Weights and Measures and it was claimed that the order was illegal and that the arrest was invalid and constituted duress and that the giving of the note under the circumstances was illegal.

Held, that in the absence of statutory provisions in Nova Scotia expressly protecting the salaries of Government officials, it was a question of fact for the commissioner whethre or not the making of the order requiring payment by instalments would impair the usefulness to the Crown of the official, and that as his order made under these circumstances was not a nullity the note was not illegal for duress or other cause.

J. T. Ross, for appellant. *A. Whitman* and *I. Oakes,* for respondents.

Full Court.] [Dec. 22, 1906.

BARNES *v.* WAUGH.

Sale of goods—Perishable nature—Merchantable condition—Depreciation through exceptional or accidental cause—Burden of proof.

Defendant by telegraph ordered fifteen barrels of oysters from plaintiff at Buctouche, N.B., to be shipped to him at Halifax, N.S., "first soft weather." The oysters were shipped as directed, going forward in two lots and were delivered to defendant at Halifax about four days after shipment. The judge of the County Court found and the evidence supported his finding that the oysters were in merchantable condition at the time they were shipped, but immediately after their receipt by defendant they were found to be bad and unfit for use. The evidence shewed that they could have only reached the condition in which they were when received through some exceptional or accidental cause such as being frozen and allowed to thaw.

Held, dismissing defendant's appeal with costs, that the oysters having been shipped in good condition and injured

through an exceptional or accidental cause were at defendant's risk.

Per RUSSELL, J., dissenting, that the burden was upon plaintiff of shewing that the deterioration was due to an accidental or exceptional cause and that in the absence of such evidence the Court must conclude that the goods were not in such condition when shipped as to be merchantable for a reasonable time after their arrival at the place to which they were shipped.

F. H. Bell, for appeal. *H. Mellish*, K.C., contra.

Full Court.] [Dec. 22, 1906.

CORBIN *v.* PURCELL.

Contract for sale of business—Misrepresentation as to profits—Restitution—Counterclaim—Judgment not appealed from.

In an action claiming a balance as due on a contract for the sale of a milk route, etc., defendant relied on misrepresentation as to the profits derived from the business and counterclaimed damages for such misrepresentation. The counterclaim was dismissed and there was no appeal.

Held, 1. As defendant had received the property and had dealt with it in such a way that he could not make restitution he could not reply upon the alleged misrepresentation as ground for rescission.

2. The counterclaim having been dismissed and no appeal taken that the Court was not in a position under the order corresponding to O.. 58, r. 4 of the English rules to make the order that the judge below should have made; that the counterclaim being a independent action if defendant was dissatisfied with the judgment dismissing it he should have appealed.

J. C. O'Mullin, for appellant. *J. J. Power* and *M. M. Reynolds*, for respondent.

Full Court.] [Dec. 22, 1906.

SLIPP *v.* MORRIS.

Appeal—County Court judge—Jurisdiction to dismiss action on appeal from Justices' Court—Certiorari.

In an action to recover a small sum in the Magistrates' Court the defendant appeared and contended that the justice had no

jurisdiction inasmuch as the cause of action arose, and defendant resided and was served in another county than that in which the justice was sitting. Judgment having been given in plaintiff's favour defendant appealed to the County Court, the judge of which dismissed the appeal on the ground that the justice having had no jurisdiction to try the case he had none to hear the appeal, and that the proper remedy was by certiorari.

Held, allowing defendant's appeal with costs, that as the judge of the County Court had jurisdiction to take evidence to establish the question of jurisdiction he had jurisdiction to determine that the action ought to have been dismissed and should have given judgment accordingly.

T. W. Murphy, for appellant. *A. Drysdale*, K.C., A.-G., for respondent.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [Dec. 21, 1906.

IVESON *v.* CITY OF WINNIPEG.

Municipality—Negligence—Notice of action—Liability for non-repair of highway.

Appeal from judgment of RICHARDS, J., noted, vol. 42, p. 525, dismissed with costs.

Robson and *Coyne*, for plaintiff. *I. Campbell*, K.C., and *T. A. Hunt*, for defendants.

Full Court.] [Dec. 21, 1906.

FRASER *v.* CANADIAN PACIFIC RY. CO.

Examination of officer of company for discovery—Duty of officer to get information for answers to questions.

On the hearing of an appeal from the decision of MATHERS, J., noted, vol. 42, p. 42, counsel for defendants undertook to produce for the inspection of plaintiff's solicitor such of the papers on file in the company's offices as referred to the matters in question, whereupon the Court allowed the appeal and set

aside the order of MATHERS, J., and re-instated the order of the referee. Costs of both appeals to be costs in the cause. The documents to be produced to be all documents other than privileged ones on which the memorandum used by Mr. Whyte on his examination or any part of it had been founded.

Mulock, K.C., for plaintiff. *Aikins*, K.C., for defendants.

Full Court.] [Dec. 21, 1906.

MALCOLM *v.* MCNICHOL.

Negligence—Landlord and tenant—Liability of contractor for negligence of employee—Principal and agent—Prescription of negligence from circumstances.

Appeal of defendant McNichol from judgment of DUBUC, C.J., noted, vol. 42, p. 165, dismissed with costs except that, on the reference to the Master, nothing is to be allowed for damages to the plaintiff's goods caused by leaking of water from the room above.

Appeal of the plumbing firm, defendants, from the same judgment allowed and action as against them dismissed with costs of the appeal only.

Hudson and *Ormond*, for plaintiff. *Aikins, K.C.*, for defendant, McNichol. *Wilson*, for other defendants.

KING'S BENCH.

Mathers, J.] [Dec. 5, 1906.

KING *v.* DOUGLAS.

Criminal law—Speedy trial—Adding charges other than that upon which prisoner elected.

At the close of the preliminary hearing of a number of charges against the defendant including theft, obtaining money by false pretences, causing and inducing the prosecutor by false pretences to execute a valuable security and also fraudulently mortgaging certain real property to which he knew he had no title, the magistrate bound the accused over, under s. 601 of the Code, to take his trial at the next Superior Court of criminal jurisdiction "on the charge aforesaid." The only charge men-

tioned in the condition of the recognizance was the one for fraudulently mortgaging real estate. Having afterwards surrendered himself to the custody of the sheriff, the accused was brought before the Chief Justice, under s. 767 of the Code, and elected to be tried speedily by a judge without a jury. No account was given by the Chief Justice to include in the indictment any additional charges under s. 773.

Held, at the trial, following *King* v. *Carrien*, 14 M.R. 52, that leave should not be given to include in the indictment any of the other charges made before the magistrate and that the prisoner must waive his right to a trial by jury upon such additional charges before he can be tried upon them by a judge.

Bonnar, for the Crown. *Aikins*, K.C., for the prisoner.

Macdonald, J.] [Dec. 14, 1906.

NAGY *v.* MANITOBA FREE PRESS CO.

Slander of real estate—Publication of statement that house haunted—Damages.

This case has attained local celebrity as the "Ghost case." On Oct. 22, 1905, a policeman made an entry in the "Occurrence Book," kept at the police station in Winnipeg, as follows:

"Second house east of Main on St. John's Avenue is believed by some people to be haunted at night between 11 and 12 midnight. There are parties of men hanging around this house, also in basement awaiting the appearance of the spook. This house is at present unoccupied."

On the next day the defendant's newspaper published an article of which the plaintiff complained in this action. It was as follows:

"A north end ghost. There is a ghost in the north end of the city that is causing a lot of trouble to the inhabitants. His chief haunt is in a vacant house on St. John's Avenue near to Main. He appears late at night and performs strange antics so that timid people give the place a wide berth. A number of men have lately made a stand against ghosts in general and at night they rendezvous in the basement and close around the haunted house to await his ghostship, but so far he still remains at large."

It was proved that the article referred to the plaintiff's house and she claimed damages alleging that the property had depreciated seriously in value in consequence of the publications of

the article and that she had suffered loss and been put to expense in other ways thereby.

Held, that there was no precedent for an action for slander of real estate.

Held, also, that the damages claimed were largely imaginary and, as a similar article had been published in another newspaper about the same time, it would be impossible to decide which of the articles caused the damages, if any in fact arose.

Action dismissed with costs.

O'Connor and *Leech,* for plaintiff. *Hudson* and *Howell,* for defendants.

Obituary.

The late Dr. Frederick W. Maitland.

On the 21st December last, Dr. Frederick William Maitland died at Grand Canary, and by his death England and the English-speaking world has lost one of its most learned and accomplished legal writers. He was the son of Mr. John Gorham Maitland, and was born in 1850. He was educated at Eton and Trinity College, Cambridge, where he distinguished himself. He was called to the Bar in 1876, and during the next thirty years was a prolific and erudite writer on legal subjects, and had the rare facility of being able to give to all his writings unique literary charm. His researches into the realms of archaic law were profound and exhaustive, and he has in his various writings thrown great light on the legal methods of by-gone ages, and invested them with a new vitality, and by his acute and critical analyses he has enabled his readers both to appreciate and understand the value of those ancient records of our law, of which England possesses such an abundant store. Among Dr. Maitland's numerous works may be mentioned his edition of Bracton's Note Book, 1887, The History of English, published in collaboration with Sir F. Pollock, 1895; Crown Law in England, 1898; The English Law and Renaissance, 1901; and he has, besides, edited several volumes of the publications of the Selden Society. His premature death will be widely and sincerely lamented.

Book Reviews.

Burial Grounds and Cemeteries, a practical guide to their administration, by EDWIN AUSTIN, Barrister-at-law, London: Butterworth & Co., law publishers, Bell Yard.

"Of comfort let no man speak, let us talk of worms, and graves, and epitaphs." This book is not of much practical use to our profession, but may be of interest at least to one of them, a bachelor friend, who some years ago took up the fad of wicker coffins, and sent to England for a sample. Being of a cheerful disposition, and practical withal, he kept it in his bedroom, not for the purpose of assisting his meditations on the shortness and uncertainty of life, but because, as he expressed it, "it is a handy thing to have around the house." We shall be glad to add this little volume to his collection.

Law Associations.

The annual meeting of the Hamilton Law Association was held in the Law Library on January 8th, 1907.

The Trustees' 27th Annual Report for 1906 shews a membership of 68, a library of 4,363 bound volumes, of which 99 were added during the year.

At the quinquennial election of Benchers, 1906, Messrs. A. Bruce, K.C., J. W. Nesbitt, K.C., and George Lynch-Staunton, K.C., were elected after nomination from this Association. Resolutions were passed placing on record the profound regret of the Association at the death of two of its most prominent members, Francis MacKelcan, Esq., K.C., who was at the time of his death President of the Association, and Henry Carscallen, Esq., K.C., M.P.P.

The following officers were elected for 1907: President, Mr. S. F. Lazier, K.C.; Vice-President, Mr. Wm. Bell; Treasurer, Mr. Chas. Lemon; Secretary, Mr. W. T. Evans; Trustees, Messrs. T. C. Haslett, Geo. Lynch-Staunton, K.C., S. F. Washington, K.C., P. D. Crerar, K.C., and E. D. Cahill.

The next annual meeting of the American (meaning the United States) Bar Association will be held at Portland, Maine, on August 26, 27, and 28. The reason for selecting these days is that the International Law Association is considering holding its meeting in the United States this year, and the suggestion has been made to that body to hold its meeting at Portland on the three days following those above mentioned.

Canada Law Journal.

VOL. XLIII. MARCH 1. NO. 5.

THE LAW OF CONTRACTS.

EQUITABLE JURISDICTION IN REGARD TO CONTRACTS OF EMPLOYMENT.

1. Scope of Article.
2. Subject considered with reference to the general principles which define the limits of equitable jurisdiction.
3. General rule that equity will not specifically enforce contracts of service.
4. Rationale of this rule.
5. Qualification of the general rule where the applicant for relief is in the employment of a body of trustees.
6. Enforcement of stipulations by employés not to perform services for any other persons than their employers. English cases reviewed.
7. Same subject. American cases reviewed.
8. Absence of express negative stipulation, to what extent a bar to exercise of equitable jurisdiction. English cases reviewed.
9. Same subject. American cases reviewed.
10. Quality of the services, how far a material element. English authorities examined.
11. Same subject. American doctrine.

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1. Scope of Article.—In this article it is proposed to consider the extent of the jurisdiction of courts of equity merely with reference of the enforcement of the two main obligations arising out of a contract of employment, viz., the obligation of the employer to retain the employé, and the obligation of the employé to remain in the service, until the termination of the agreed period. The exercise of that jurisdiction in cases involving obligations arising out of the fiduciary relations of the parties will not be discussed.

2. Subject considered with reference to the general principles which define the limits of equitable jurisdiction.—Where an equitable remedy is sought for the purpose of enforcing a contract of service, there is always a preliminary question to be settled, viz., whether the court, having regard merely to the operation of the general principles which define the circumstances under which a remedy of this description is granted, and leaving out of account the special considerations which will be dealt with in the following sections, should entertain jurisdiction of the suit. A discussion of the subject, therefore, may be appropriately commenced with a statement of the effect of the cases in which the rights of the parties have been determined with reference to those general principles.

In this point of view it is clear that an application for equitable relief must fail, if the allegations in the plaintiff's bill disclose one or more of the following predicaments.

(*a*) That no action at law can be maintained upon the contract which it is sought to enforce[1].

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[1] In *De Francesco* v. *Barnum* (1889) 59 L.J. Ch. 151, 43 Ch. D. 165, 62 L.T. 40, 38 W.R. 187, 54 J.P. 420, Chitty, J., on the ground that no action could be maintained against an infant on his covenant in a deed of apprenticeship, (*Gylbert* v. *Fletcher*, [1629] Cro. Car. 179), held that, apart from any question whether the contract was for his benefit or not, an infant apprentice could not be enjoined from violating a covenant to the effect that he could neither contract professional engagements nor accept such unless with the full written permission of his master. "The right to an injunction," said the learned judge, "depends upon the legal right to sue, and if there is no legal right to sue, which appears to be the result of the authority which I have cited, there can be no right to an injunction." This statement was approved by Fry, L.J., in the subsequent trial of the action for damages. See 45 Ch. D. 165.

The principle that "before the court can act in the exercise of its peculiar jurisdiction to enforce specific performance of an agreement, it must be satisfied that there is not a reasonable ground for contending that the agreement is illegal or against the policy of the law," was also recognized in *Johnson* v. *Shrewsbury & Birmingham Ry. Co.* (1853) 3 DeG. M. & G. 914. One of the clauses of the agreement there under discussion provided that the plaintiffs were at all times during the term of the contract to run and work all the trains of the railway company, and to provide for the purposes of the contract a sufficient number of efficient foremen, mechanics, engine drivers, firemen, etc. On the ground that the effect of this provision was to devolve the traffic business of the company upon persons whom the Legislature had not intrusted with it, and on whom it had not attached the same responsibility as it had attached upon the company, two of the Lords Justices (Turner and Kay) entertained doubts as to its legality. But the decision of the court proceeded upon another ground stated *post* (§ 3, note 1, *post*).

(*b*) That the contract is lacking in mutuality[2]. As a servant cannot be compelled to perform his duties against his will, this consideration is of itself sufficient to prevent a servant from obtaining from a court of equity a decree requiring his master to retain him in the employment[3]. See § 3, *post*.

(*c*) That the contract is not reasonably certain and definite in its terms[4].

In *Fredericks* v. *Mayer* (1857) 13 How. Pr. 566, Aff'd. 1 Bosw. 227, Hoffman, J., refused to grant an injunction *pendente lite* to restrain the alleged breach of a stipulation not to perform in any theatre but that of the plaintiff, the ground assigned being that the rights of the plaintiff and the co-defendant of the actor to his services were equal.

[2] In *Philadelphia Ball Club* v. *Lajoie* (1902) 210, where the contract was for the exclusive services of a professional base-ball player, the court thus replied to the argument of counsel that the reservation by the plaintiff of a right to terminate the contract upon ten days' notice destroyed the mutuality of the remedy. "The defendant has the possibility of enforcing all the rights for which he stipulated in the agreement, which is all that he can reasonably ask; furthermore, owing to the peculiar nature and circumstances of the business, the reservation upon the part of the plaintiff to terminate upon short notice, does not make the whole contract inequitable."

[3] In *Johnson* v. *Shrewsbury, etc., R. Co.* (1853) 3 De G. M. & G. 914, Knight Bruce, L.J. (p. 927), thus distinguished the situation in the case before him from that presented in *Lumley* v. *Wagner* (§ 6, *post*): "There all, the obligations on the part of the plaintiff could have been satisfied by the payment of money, but not so those of the defendant. Here the parties are reversed. Here all the obligations of the defendants can be satisfied by paying money; but not so the obligations of the plaintiffs, who come here for the purpose in effect of compelling the defendants, by a prohibitory or mandatory injunction, to do or abstain from doing certain acts, while the correlative acts are such as the plaintiffs could not be compelled to do."

The text is also supported by *Pickering* v. *Bishop* (1843) 2 Y. & C. C. C. 266; *Millican* v. *Sulivan* (1888) 4 Times L.R. 203.

[4] In *Mapleson* v. *Bentham* (1871) 20 W.R. 176, one of the grounds on which Wickens, V.C., refused to enjoin an opera singer from breaking his contract to sing during the whole London season, and nowhere else in Great Britain "*pendant l'année* 1871," without the consent of his employer, was, that it was uncertain whether the restrictive clause applied to the period between the close of the season and the end of the year. This point was not adverted to by the Court of Appeal in its affirming judgment; (see p. 177 of the report).

A contract for the services of a baseball player for one year at a fixed salary for that year, and reserving an option on the services of such employé for the following year at a salary of not less than a certain sum, but not providing any fixed salary or definite terms and conditions for the second year, was held to be, as to the second year, so far lacking in definiteness that the employé would not be restrained by an injunction *pendente lite* from making another contract for the second year.

(*d*) That the contract constitutes a "hard bargain," that is to say, one which may properly be described by such epithets as "unreasonable," "unconscionable," "oppressive," and the like [5].

Metropolitan Exhibition Co. v. *Ewing* (1890) 7 L.R.A. 381, 24 Abb. N. Cas. 419, 42 Fed. 198. "The effect of these provisions," said the court, "is that, when the club has exercised its privilege of reservation, no other club is permitted to negotiate with the player; but the club which has placed him upon the reserved list, and no other, is then at liberty to enter into a contract with him to obtain his services for an ensuing year. Consequently the right of reservation is nothing more or less than a prior and exclusive right, as against the other clubs to enter into a contract securing the player's services for another reason. . . . As a coercive condition which places the player practically, or at least measureably, in a situation where he must contract with the club that has reserved him, or face the probability of losing any engagement for the ensuing season, it is operative and valuable to the club. But, as the basis for an action for damages if the player fails to contract, or for an action to enforce specific performance, it is wholly nugatory. In a legal sense, it is merely a contract to make a contract if the parties can agree." The court also held that there was no necessity to particularize in such a contract the conditions or characteristics of the option if, when the contract was made, the term "reserve" had a well-understood definition.

A similar decision was rendered with regard to a similar contract in *Metropolitan Exhibition Co.* v. *Ward* (1890) 9 N.Y. Supp. 779, 24 Abb. N.C. 393.

[5] By an apprenticeship deed between an infant, her parent, and the plaintiff, the infant was bound apprentice to the plaintiff for seven years, to be taught stage dancing, upon certain terms, by one of which the infant contracted that she would not accept any professional engagement or contract matrimony during the said term without the consent of her master. The deed also contained mutual covenants by the master and the parent that the master would properly instruct the infant, and make certain payments to her for all dancing engagements in this country and in foreign or colonial countries; in return for which the infant's services were to be entirely at the disposal of the master. But there was no stipulation that the master should provide engagements for the infant or maintain her while unemployed. There was also a provision that the master might put an end to the apprenticeship if the infant should be found after fair trial unfit for the work of stage dancing, or should break any of the engagements of the deed, or in any way misconduct herself. The infant having made a professional engagement with the defendant B., the plaintiff brought an action against B., the infant, and her parent, to enforce the provisions of the deed and for damages for breach of it. *Held*, that the provisions of the deed were unreasonable, and could not be enforced against the infant or her parent; and consequently that no action would lie against B. for enticing her away from the plaintiff's employment. *De Francesco* v. *Barnum* (1890) 43 Ch. D. 165, 45 Ch. Div. 430.

In the first case reported under the caption, *Lanner* v. *Palace Theatre* (1893) 9 Times L.R. 162, Chitty, J., granted an injunction to restrain a lady from accepting an engagement as a ballet dancer, in breach of a stipulation not to perform for any other person than the plaintiff, her instructor, for a period of six weeks. Referring to his own decision in *Francesco* v. *Barnum*, *supra*, the learned judge said that the "slavery argument" had no application to the case. He also remarked that the "starvation argu-

(*e*) That the plaintiff has not come into court with clean hands[6].

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ment" was purely rhetorical in this instance, as such an engagement only occupied a small part of the defendant's time, and she had many hours available for other honest ways of obtaining a livelihood.

In the second case under the same caption, the same judge granted an injunction to restrain a lady of twenty-two from violating a stipulation in a six years' contract of apprenticeship, entered into with the same teacher of dancing. that she would not enter the service of any other person during the specified period without her teacher's permission. He considered that a six years' term was not too long for a person of the defendant's age, and also held that it was not unfair either to reserve one-third of her earnings as remuneration for the instruction given or to reserve control over her engagements.

A traveller for a firm of wine merchants, agreed to devote the whole of his attention and time to the business of the plaintiffs, and not directly or indirectly to engage or employ himself in any other business, or transact any business with any other person or persons than the plaintiffs for a term of ten years. *Held*, that these negative stipulations in this contract were unreasonable. *Ehrman* v. *Bartholomew* (1898) 1 Ch. 671, 78 Law T. Rep. 646, 67 L. J. Ch. N.S. 319. After stating the effect of the sweeping provisions of the contract, Romer, J., observed: "The court, while unable to order the defendant to work for the plaintiffs, is asked indirectly to make him do so by otherwise compelling him to abstain wholly from business, at any rate during all usual business hours. In my opinion such a stipulation is unreasonable and ought not to be enforced by the court. . . . To enforce such a general stipulation as I find here would be in my opinion a dangerous extension, [*i.e.*, of the cases in which negative stipulations have been enforced], for here the stipulation extends to business of any kind, while the negative stipulations enforced in the prior cases, such as *Lumley* v. *Wagner*, 5 De G. M. & Sm. 485, 1 D. M. & G. 604 (§ 6, *post*), were confined to special services."

There is nothing unreasonable in a contract the effect of which is that, so long as the servant is in the master's employ, he is not to work for anybody else or engage in any other business. Lindley, M.R., in *Robinson* v. *Hener* (1898) 2 Ch. 451 (455).

In *Kimberley* v. *Jennings* (1835) 6 Sim. 340, Shadwell, V.C., held that an agreement drawn in such terms, that if, from illness or any other cause over which the defendant could have no control, he should become incapable of serving the plaintiffs, they should have the option either of discharging him, or discontinuing the payment of his salary, and insisting that. for the remainder of the six years, he should not engage in the service of any other individual, in the same capacity, or in any other trade, business, profession or employment whatsoever, without the written consent of the plaintiffs, or the survivor of them, was a hard bargain, considering that parties to it were a young man and a firm of wealthy merchants. Accordingly he refused to enjoin the employé from violating the negative stipulations.

A restrictive covenant prohibiting an actress from appearing in any other theatre from the date of the contract, and not from the commencement of the season, was held not to be inequitable, in a case where she was shown to have considerable experience and business capacity. *Daly* v. *Smith* (1874) 38 N.Y. Supr. Ct. 158.

A contract with a singer to appear in such operas as the employer shall produce in a certain season will not be pronounced inequitable for the mere reason that it provides that two weeks' notice of the termination

(*f*) That, at the time of the institution of the suit, the plaintiff is already in default as regards the performance of the contract on his side, or is in such a position that he will probably be unable to perform it, if the defendant carries out his agreement[7].

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of the season might be given by the plaintiff. *Duff* v. *Russell* (1891) 14 N.Y. Supp. 134. This decision was affirmed by the Supreme Court without an opinion in 16 N.Y. Supp. 958, and by the Court of Appeals in 133 N.Y. 678. The lower court seems to have based its conclusion in the notion, that such a contract should be placed in a different class from those by which the right of terminating the employment by a specified notice is vested in the employer alone. Yet in another New York case, decided about the same time, it was expressly held that a contract between an actress and the owner of a theatre, by which she gives him the exclusive right to her services, with the option in him alone to terminate the contract at any time, is not unconscionable. *Hoyt* v. *Fuller* (1892) 19 N.Y. Supp. 962.

[6] Where an author who has undertaken to write tales for a magazine for a year, ceases writing and enter into engagements elsewhere in violation of the stipulations of his contract, the mere fact that the employer has, upon the abandonment of the contract by the author, procured the services of another writer to wind up the work properly, is not such a breach of the contract as will disable him from obtaining relief on the ground that he does not come into court with clean hands. *Stiff* v. *Cassell* (1856) 2 Jur. N.S. 348.

In *Duff* v. *Russell* (1891) 14 N.Y. Supp. 134, the court rejected the contention of the defendant, a well-known opera singer, that she was justified in breaking her contract with the plaintiff because the plaintiff had refused to substitute a more healthful costume for the tights in which the defendant had appeared in a certain opera, and which she objected to wear on the ground of danger to her health. The conclusion arrived at by the court, after an examination of all the facts, was that the plaintiff had not "so unreasonably insisted upon his rights under the contract to the detriment of the health of the defendant that, in equity and good conscience, she was justified in breaking off her engagement."

A mere general allegation, without any particulars, that the intention of a theatrical manager in entering into a contract with an actress was to prevent her from appearing on the stage, and thus injure her professional standing, is no defense to a suit for an injunction to restrain her from violating her covenant not to appear in any other theatre but that of her employer. *Daly* v. *Smith* (1874) 38 N.Y. Super. Ct. 158, 49 How. Pr. 150.

[7] In *Fechter* v. *Montgomery* (1863) 33 Beav. 22, an injunction to restrain an actor from entering into another engagement was refused on the ground that the employer had not allowed him such opportunities for the display of his talents as it must be supposed were contemplated by him when he made the contract, and were his inducement in making it.

In *Daly* v. *Smith* (1874) 49 How. Pr. 150, 38 N.Y. Super. Ct. 158, the court, distinguishing the above case held that the fact of the plaintiff's not having allowed the defendant, an actress, sufficient opportunities for displaying her talents during a previous engagement did not preclude the plaintiff from obtaining an injunction to restrain her from breaking her contract. The fact that the season had been closed before the time expected, thus depriving her of a prospective benefit, was also held not to be

(*g*) That no present damage will accrue to the plaintiff by reason of the breach of the contract. Under some circumstances this may be ground for denying equitable relief[8]. But it is apprehended that, even if the decision in the case cited be accepted as correct, no general rule can be laid down under this head, and that cases may arise in which the certainty of future

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a defence to the suit, as she had an adequate legal remedy for the injury complained of. But the correctness of the latter of these rulings seems to be open to question. If the actress had a legal right of action, then, *ex hypothesi*, the employer must have been chargeable with a breach of the contract on his side.

Merely hiring another actor to take the place of the defendant in one of the stipulated pieces after he absented himself, and declining to dismiss the substitute, while that piece is running, is not such a breach of the manager's part of the contract as will preclude him from obtaining an injunction. *Montague* v. *Flockton* (1873) L.R. 16 Eq. 189.

One who has employed an opera singer under a contract that she will not render services except at those places under his management is not entitled to an injunction restraining her from so doing, where he has failed to pay her for services rendered under a previous engagement, and it is apparent from the evidence that he will be unable to pay the stipulated salary, unless the season proves to be successful. The court said that the defendant ought not to be subjected to this contingency, and laid down the general principle that a negative covenant should not be enforced, where if the court has the power, it would not enforce an affirmative covenant. *Rice* v. *D'Arville* (1895) 162 Mass. 559, 39 N.E. 180. It was further held that the fact that the plaintiff at the hearing offered a bond for the performance of his contract made no difference, both for the reason that it had been offered after the defendant had, for good cause, refused to continue with the plaintiff, and had entered into other engagements, and for the reason that a bond is not an assurance that the money will be paid when due according to the terms of the contract, but an agreement which usually has to be enforced by a lawsuit.

[8] In *De Pol* v. *Sohlke* (1867) 7 Rob. 280, one of the grounds on which an injunction to prevent a danseuse from violating a covenant not to render personal services as such to any person other than the plaintiff, was denied was that, as the only way in which the defendant's breach of contract could produce damage was by the withdrawal of custom, and the plaintiffs' had no establishment in active operation when the suit was brought, and were not likely to have one for some time, no damages were then resulting, or would for an appreciable period result, from the act which it was sought to enjoin. The conclusion drawn was that the circumstances did not supply the necessary foundation for invoking the exercise of an equitable jurisdiction of which the rationale was, that it was impossible to measure the damages which would follow from the breach of a restrictive provision like the one in question. This reasoning is not altogether satisfactory. It would seem that damages, both tangible and incapable of exact measurement, might fairly be said to be the natural consequence of the defendants exhibiting her accomplishments at other establishments, and thus satisfying the curiosity of a certain number of the persons who would probably have visited the plaintiffs' establishment, as soon as it was in operation.

damage, as a result of the defendant's renunciation of his obligations, will justify the issuance of an injunction.

(*h*) That the time for commencing the performance of the contract has not yet arrived, when the application for relief is made[9]. But in this instance also it is submitted that no general rule can be laid down. If at the time when the suit is brought the defendant has absolutely repudiated the contract, or has placed himself in such a position that he will be unable to carry it out, it is difficult to see why the legal right, which under such circumstances may be asserted in an action for damages[10], should not be an appropriate subject for the protection of a court of equity.

(*i*) That the defendant's breach of the contract will not cause any irreparable injury to the plaintiff[11]. Under this head

[9] In *De Rivafinoli* v. *Corsetti* (1833) 4 Paige Ch. 264, Walworth, Ch., thus stated his conclusions with regard to application for the assistance of the court in enforcing the contract of an operatic singer, who, as was alleged, was about to leave New York: "From the terms of the agreement as stated in the bill, it is evident that there can be no breach thereof until the 1st of November next, when the engagement of the defendant was to commence. Even when that time arrives, the complainant will not be entitled to the defendant's services until he shall have paid or tendered to him a half month's salary in advance. A specific performance cannot be decreed upon the present bill, because at the time it was filed the complainant had no right of action against the defendant, either at law or in equity. And I believe this court has never yet gone so far as to sustain a bill *quia timet*, because the complainant apprehended that the defendant might not be willing to perform an engagement for personal services, and where, from the peculiar nature of those services, they could not be performed until a future day. The writ of *ne exeat* is in the nature of equitable bail; and to entitle the complainant to such bail, there must be a present debt or duty, or some existing right to relief against the defendant or his property, either at law or in equity. The writ in this case, therefore, was prematurely granted; and the rule to discharge it must be made absolute."

[10] *Hochster* v. *De La Tour* (1853) 2 El. & Bl. 678. The principle embodied in this decision was apparently not considered by the judge who decided the New York case just cited. Otherwise he would scarcely have laid it down without qualification that there could be no breach of the defendant's contract until the arrival of the time when the actual performance of the contract was to begin. But it is to be observed that the principle referred to had not been clearly defined and established at the date when the New York case was decided.

[11] In *Mapleson* v. *Bentham* (1871) 20 Weekl. Rep. 176, involving a contract the effect of which has been stated in note 4, *supra*, one of the grounds upon which the Court of Chancery and the Court of Appeal based their refusal to grant an injunction or an interlocutory application was, that there was no evidence of any irreparable injury likely to result to the plaintiff.

may be noticed the rule, that the court will usually refrain from interference, where it is expressly provided that a certain sum shall be paid as liquidated damages, if the contract is violated [12].

See also *Mapleson* v. *Del Puente*, cited in the next note. The court there referred to the unreputed case of *Mapleson* v. *Lablache* (1883) in the Superior Court of New York, where an injunction *pendente lite*, restraining defendant from singing for others, in violation of her contract to sing for the plaintiff, was denied, as the complaint did not aver that plaintiff would suffer irreparable injury from defendant's refusal to sing for him, nor that he could not easily have procured an artist competent to fill defendant's place.

In *De Pol* v. *Sohlke* (1867) 7 Rob. (N.Y.) 280, a temporary injunction restraining a danseuse from violating a covenant not to render her services to persons other than the plaintiff, was dissolved, for the reason that there was nothing to show that such a remedy was necessary to prevent irreparable damage to the plaintiffs.

[12] In *Hahn* v. *Concordia Soc.* (1875) 42 Md. 460, an actor's contract, by which he agreed not to give his services elsewhere without the permission of the employer, contained a stipulation to the effect that, if he should break his engagement, he was to pay to the company a fine of $200, and then provided that "this sum was already forfeited by any violation of the contract, and required no particular legal proceedings for its execution." The court refused to enjoin the defendant from performing at another theatre, saying: "Having by their own contract, made presumably with full knowledge of the means and ability of the defendant, and having fixed by their own estimate the extent of injury they would suffer from a non-observance of this condition, and having indicated as clearly as if so stated in terms, that the only form in which they could seek redress and recover the stipulated penalty or forfeiture, was a court of law, the complainants are precluded from now resorting to a court of equity for relief by way of injunction, on the ground that a violation of this part of the contract would result in irreparable damage and injury to them."

In *Mapleson* v. *Del Puente* (1883) 13 Abb. N.C. 144, defendant agreed to sing for plaintiff, in theatres and concerts, between specified dates, a certain number of times in each week, and not to sing "in public or private concerts," during his engagement, without plaintiff's permission; and in case of failure to fulfil his contract, he agreed to pay to plaintiff, "for damages and expenses, the fixed penalty of fifteen thousand francs." In an action for specific performance, and to enjoin defendant from singing for another manager, and on motion to continue *pendente lite* a temporary injunction before granted, wherein it appeared that defendant, by written notice of his refusal to fulfil his engagement, had given plaintiff ample time to secure a substitute, and that plaintiff had done so, and that defendant had tendered the amount of the "fixed penalty" in open court, it was held that the motion should be denied, and the injunction should be dissolved. The court said: "There is no evidence that plaintiff is exposed to irreparable injury by reason of defendant's failure to sing for him. His theatre is now engaged in the performance of operas, in which the place which would have been filled by the defendant is filled by another artist. . . . I am disposed to regard the sum as 'liquidated damages'; and if that be so, the defendant having tendered the amount to the plaintiff in open court, he has complied with that obligation of the contract. This tender also is important as to the question of the inability of the defendant to pay damages to the plaintiff if a judgment for damages were rendered against him."

But a specification of a penalty, designed merely to secure a performance of the contract, and not intended as the price or equivalent to be paid for its non-performance, will not be construed as a provision for stipulated damages, nor prevent the court from granting relief [13].

(*j*) That the applicant has an adequate legal remedy [14].

3. General rule that equity will not specifically enforce contracts of service.—The general rule applicable to all classes of cases, except those reviewed in §§ 5-11, *post*, is, that a contract of service will not be specifically enforced, either directly by means of a decree directing the defendant to perform it, or by an injunction restraining him from violating it[1].

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[13] *M'Caull* v. *Braham* (1883) 16 Fed. 37. There a contract for the exclusive services of a singer in opera provided for "the forfeiture of a week's salary, or the termination of the engagement at the manager's option, without debarring him from enforcing the contract as he might see fit." That the clause respecting the forfeiture was in the nature of a penalty, and designed solely to secure the observance of the contract, was held to be manifest both from the general nature of the employment and the requirements of a manager of opera, and from the express language of the clause; because (1) the stipulation was not for the payment of a certain sum as liquidated damages, but only for the forfeiture of a week's salary; (2) it gave an option to the plaintiff, instead of such forfeiture, to annul the engagement; (3) it declared that such forfeiture should not debar the plaintiff from enforcing the fulfillment of this contract in such a manner as he should think fit, *i.e.*, by any available legal or equitable remedy.

[14] In *Johnson* v. *Shrewsbury & Birmingham Ry. Co.* (1853) De G. M. & G. 914. This was one of the grounds assigned for refusing to enjoin the defendant from determining a contract, the provisions of which are stated in § 3. note 1, *post*.

See also *Bronk* v. *Riley* (1888) 50 Hun. 489, where the decision was partially based on a similar ground.

[1] For statements of the rule in general terms see *Whitwood Chemical Co.* (1891) 2 Ch. 416, L.J. (p. 426); *Robinson* v. *Heuer* (1898) 2 Ch. Div. 451 (456); *Rolfe* v. *Rolfe* (1846) 15 Sim. 88; *Chinnock* v. *Samsbury* (1861) 30 L.J. Ch. 409; *Webb* v. *England* (1860) 29 Beav. 44 (45); *Haight* v. *Badgeley* (1853) 15 Barb. 499; *Hamblin* v. *Dinneford* (1835) 2 Edw. Ch. 529; *Wm. Rogers Mfg. Co.* v. *Rogers* (1890) 58 Conn. 356.

(*a*) *Illustrative cases in which the applicant for relief was the employer.*—In *Rolfe* v. *Rolfe* (1846) 15 Sim. 88, it was declared by Shadwell, V.C., that the court certainly would not enforce a provision in a contract by the defendant who undertook to work as a tailor's cutter.

In *Radford* v. *Campbell* (1890) 6 Times L.R. 488, the Court of Appeal approved the decision of North, J., refusing an injunction to restrain a salaried professional football player from breaking an agreement to play

In cases where the party seeking the assistance of the court is the employé, the mere fact that the reputation of the employé

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solely for the plaintiff, a football club, during a certain season. Lord Esher remarked that there was no question of character, or of property involved, except that it was alleged that there would be a diminution of the gate money. The real point was the pride of the employing club who wanted to win games; and it was not fitting that the solemn machinery of the court in granting an injunction should be invoked in order to satisfy that pride. This decision is in conflict with the American cases in which prohibitory injunctions have been issued against professional base-ball players on the ground of the unique character of the services. See § 11, note 8, *post*.

In *Welty* v. *Jacobs* (1898) 171 Ill. 624-30, aff'g 64 Ill. App. 285, the manager of a theatrical company was refused an injunction to restrain the proprietor of a theatre from refusing to furnish his theatre, stage hands, music, etc., according to the terms of a contract for the appearance of the company on a certain date, and from letting the theatre to another company at that time.

The rule that one person cannot be compelled to serve another against his will was also recognized in *Boyer* v. *Western U. Tel. Co.* (1904) 124 Fed. 246.

In Louisiana, bound servants and apprentices and their master may be compelled to the specific performance of their respective engagements. La. Civ. Code (1889) Art. 170 (164).

(*b*) *Illustrative cases in which the applicant for relief was the employé.*—A railway company agreed with contractors that the contractors should work the line and keep the engines and rolling plant in repair at a specified remuneration, and that the contract should be in force for seven years, but with a proviso for its determination if the contractors did not, within forty-eight hours after notice given by the company, obey the instructions contained in such notice. *Held*, that the agreement was not of such a kind as to be enforceable by injunction restraining the company from determining the contract and resuming the possession of their line for non-obedience to impracticable instructions. *Johnson* v. *Shrewsbury & B. R. Co.* (1853) 3 De G. M. & G. 914. Distinguishing the case of *Lumley* v. *Wagner* (see § 6, *post*), Turner, L.J., said: "In that case the court was called upon to prevent a singer who had been engaged by the plaintiff from singing for hire for other persons. The object of the plaintiff was to restrain the defendant from hiring herself to other persons; but, in this case, what the plaintiffs ask is to restrain the defendants from not employing them as their contractors. In that case it was possible to enforce the contract as against the defendant, while in this case it is not."

On the ground that an injunction could not be issued in favour of an employé entitled only to a month's notice, Wills, J., refused an injunction to restrain a school board from dismissing a master who had been charged with assaulting a girl, but had been acquitted a few days after the dismissal. *Kemp* v. *School Board of Caddington* (1893) 9 Times L.R. 301.

In *Brett* v. *East India & London Shipp. Co.* (1864) 2 H. & M. 404, Page Wood, V.C., (afterwards Lord Chancellor Hatherley), refused specific performance of an agreement to employ the plaintiff as a ship broker, one of the stipulations being that the plaintiff's name should appear jointly with that of the secretary of the defendant's company in all advertisements of the company.

In *Ryan* v. *Mutual, etc., Assoc. L. R.* (1892) 1 Ch. Div. 116, the court refused to grant relief, on the ground that a contract between the lessees and the lessor of a block of buildings, whereby the latter had stipulated that the premises should be in charge of a resident porter who was to act as

may suffer in consequence of his being dismissed is not deemed to constitute a sufficient ground for equitable interference. If such an injury should result, he has an adequate remedy open to him at law [2]. Nor does he entitle himself to relief by showing that he has paid money for the privilege of being adopted to the place in question [3]. Nor is an employé of a corporation who holds a considerable portion of the stock in any better position than one who hold no interest [4].

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the servant of the lessees, and to be constantly in attendance for the performance of certain services, was an entire contract.

On the ground that the duties of the agent of a limited company are in the nature of personal service, the court refused to restrain the directors from acting upon or enforcing the resignation of A. whose management and agency was made a prominent condition in the prospectus on the formation of the company, and expressly provided for by the articles of association. *Mair* v. *Himalaya Tea Co.* (1865) L.R. 1 Eq. 411.

In *Seiler* v. *Fariex* (1871) 23 La. Ann. 397, where the owner of a plantation had contracted with the plaintiff to take charge of his plantation for a term of eight years, to reside thereon with his family, and to have exclusive control and direction of all the business affairs appertaining thereto during said term, the court refused to enjoin the defendant from superseding and forcibly dispossessing him, and removing his family.

In *Healy* v. *Allen* (1886) 38 La. Ann. 867, the court in refusing to enjoin the dismissal of a sexton of a cemetery said: "From no point of view, under the evidence in this case, can the relation between the parties herein be regarded as other than a contract for personal service. Plaintiff is not the owner nor the lessee of the cemeteries; he is simply charged with certain duties in the administration thereof, for the proper performance of which he is necessarily answerable to his superior. The position of sexton is not a franchise which can only emanate from governmental authority; nor is it a public office, which must have a like origin."

In *Healey* v. *Dillon* (1886) 30 La. Ann. 503, 2 So. 49, the court refused to enjoin the appointment of a successor to the same plaintiff.

Other cases in which the rule in the text was applied or recognized are, *Stocker* v. *Brokelbank*, 3 Mac. & Gord. 250, 20 L.J. Ch. 401; *Boyer* v. *Western U. Tel. Co.*, 124 Fed. 246; *Kennicott* v. *Leavitt* (1810) 37 Ill. App. 435 (manager of theatre); *Miller* v. *Warner* (1899) 42 App. Div. 208, 59 N.Y. Supp. 956 (court refused to enjoin dismissal of superintendent of police telegraph system of a city, the ground of the refusal being that he was a mere employé, and not a public officer); *Bronk* v. *Riley* (1888) 50 Hun. 489, 20 N.Y. S.R. 401 (court refused an injunction to compel a person to continue a business in which he had engaged the plaintiff's services for a specific period); *Stone Cleaning & Pointing Union* v. *Russell* (1902) 77 N.Y. Supp. 1049, 38 Misc. Rep. 513 (breach of contract to employ members of a certain labour union will not be enjoined).

[2] Knight Bruce, L.J., in *Johnson* v. *Shrewsbury & B. R. Co.* (1853) 3 De G. M. & G. 914 (930).

[3] *Healy* v. *Allen* (1886) 38 La. Ann. 867 (sexton of cemetery by whom money had been paid in consideration of certain incidental advantages accruing to him in his trade as marble cutter).

[4] *Stewart* v. *Pierce* (Iowa Sup. Ct. 1902) 89 N.W. 234 (court refused to order continuance of the plaintiff's employment after the expiration of his

4. Rationale of this rule.—An examination of the language used by judges shows that this rule has been referred to two distinct considerations:—

(*a*) That it is, as some of the authorities put it, inconvenient, or, as others express it, impossible, for a court of justice to conduct and supervise the operations incident to and requisite for the execution of a decree for the specific performance of a contract which involves the rendering of personal services[1]. Either

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contract, although he owned a half interest, and was a party to a contract with the owners of the remaining stock, which provided for equal control of the stock and equal services).

See also *Reid Ice Cream Co.* v. *Stephens* (1895) 62 Ill. App. 334 (where a part of an agreement made by a corporation in taking over the plaintiff's business was that he was to receive a monthly salary for services to be rendered); *Mills* v. *United States Printing Co.* (1904) 99 App. 605, 91 N.Y. Supp. 185 (court refused to enjoin the defendant from discharging the plaintiff on the ground that he had declined to join a labour union, and from carrying out contracts with unions which embraced a stipulation to employ only union workmen).

[1] "The nature of the contract is not one which requires the performance of some definite act, such as this court has been in the habit of requiring to be performed by way of administering superior justice rather than leave the parties to their rights and remedies at law. It is obvious that if the notion of specific performance were applied to ordinary contracts for work and labour or for hiring and service, it would require a series of orders and a general superintendence which could not conveniently be undertaken by any courts of justice; and therefore contracts of that sort have been ordinarily left to their operation at law." Lord Selborne in *Wolverhampton & W. R. Co.* v. *London, etc., R. Co.* (1873) 00 L.R. 16 Eq. 438 (440).

In *Millican* v. *Sulivan* (1888) 4 Times L.R. 203, Fry, L.J., observed that enormous "inconvenience" would be occasioned, if courts of equity were to enforce the continuance of strictly personal relations, under penalty of imprisonment for contempt of court, and that it was on the ground that such a course would be too gross an interference with the liberty of the subject, that courts of equity had refused to enforce such relations.

See also *Ryan* v. *Mutual, etc., Asso.* (1892) 1 Ch. D. 116, where equitable relief was refused on the ground that it would require continuous supervision by the court.

In *Kemble* v. *Kean* (1829) 6 Sim. 333, Shadwell, V.C., argued as follows: "Supposing Mr. Kean should resist, how is such an agreement to be performed by the court? Sequestration is out of the question; and can it be said that a man can be compelled to perform an agreement to act at a theatre by this court sending him to the Fleet for refusing to act at all? There is no method of arriving at that which is the substance of the contract between the parties, by means of any process which this court is enabled to issue."

In *Hamblin* v. *Dinneford* (1835) 2 Edw. Ch. 529, a similar case, the court argued thus: "The difficulty is how to compel specific performance. The court cannot oblige Mr. Ingersoll to go to the Bowery Theatre and there perform particular characters. Imprisonment for a contempt would be the

extreme inconvenience or actual impossibility would doubtless constitute a sufficient ground for refusing to undertake to enforce specific performance. But the predicament encountered in this instance would seem to be more accurately referred to the category of things "impossible" than to that of things "inconvenient." Even imprisonment for contempt of court is ineffectual to overcome stubborn contumacy[2].

(*b*) That in view of the peculiar personal relations which result from a contract of service, it would be inexpedient, from the standpoint of public policy, to attempt to enforce such a contract specifically[3]. The cases in which this consideration

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consequence of his refusal, and this would defeat the very performance sought to be enforced."

In *Whitwood Chem. Co.* v. *Hardman* (1891) 2 Ch. 416, Kekewich, J., remarked, *arguendo*: "It would be quite impossible to make a man work, and therefore the court never attempts to do it."

"A specific performance in such cases is said to be impossible because obedience to the decree cannot be compelled by the ordinary processes of the court. Contracts for personal acts have been regarded as the most familiar illustrations of this doctrine, since the court cannot in any direct manner compel the party to render the service." *Wm. Rogers Mfg. Co.* v. *Rogers* (1890) 58 Conn. 356.

In one case we find the somewhat guarded statement, that the difficulty if not the utter impracticability, of compelling the performance of such an agreement, is a conclusive reason why a court of equity should refuse to interfere. *Sanquirico* v. *Benedetti* (1847) 1 Barb. 315.

[2] It is apparent that, under no social system of which we have any record, has the sovereign authority been able to put into motion a coercive machinery for the purpose of overcoming the determined passive resistance of an employer to a judicial decree ordering him to retain an employé. In states where slavery exists an effectual means of compelling an employé to fulfill his contract is available. But this consideration is of no practical importance in any country with which we are concerned in the present treatise.

[3] In *Johnson* v. *Shrewsbury & Birmingham Ry. Co.* (1853) 3 De G. M. & G. 914 (924), Knight Bruce, L.J., observed with regard to a contract the effect of which is stated in § 3, note 1, *ante*: "There is here an agreement, the effect of which is that the plaintiffs are to be the confidential servants of the defendants in most important particulars, in which, not only for the sake of the persons immediately concerned but for the sake of society at large, it is necessary that there should be the most entire harmony and spirit of co-operation between the contracting parties. How is this possible to prevail in the position in which (I assume for the purpose of the argument by the default of the defendants) the defendants have placed themselves? We are asked to compel one person to employ against his will another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still if the two do not

most naturally suggests itself as a factor of controlling importance are those which relate to employments of a distinctly confidential character[4]. But its applicability, as one of the bases

agree, and good people do not always agree, enormous mischief may be done. A man may have one of the best domestic servants, he may have a valet whose arrangement of clothes is faultless, a coachman whose driving is excellent, a cook whose performances are perfect, and yet he may not have confidence in him; and while on the one hand all that the servant requires or wishes (and that reasonably enough) is money, you are on the other hand to destroy the comfort of man's existence for a period of years, by compelling him to have constantly about him in a confidential situation one to whom he objects. If that be so in private life, how important do these considerations become when connected with the performance of such duties —duties to society—as are incumbent upon the directors of a company like this I think that by interfering in the present case there would be no equality." The remarks of Turner, L.J., at p. 930, are to the same effect: "The inconvenience and mischief to the defendants, to say nothing of the interest of society at large, would be greater if the court should interfere than anything that could possibly happen to the plaintiffs by declining to interfere."

In *Francesco* v. *Barnum* (1890) 45 Ch. D. 430 (438), Fry, L.J., said: "For my own part, I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of mankind that the rule of specific performance should be extended to such cases. I think the courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery; and, therefore, speaking for myself, I should lean against the extension of the doctrine of specific performance and injunction in such a manner."

In *Whitwood Chemical Co.* v. *Hardman* (1891) 2 Ch. 416, Lindley, L.J., after stating that he looked upon *Lumley* v. *Wagner* (§ 6, *post*), "as an anomaly to be followed in cases like it, but an anomaly which it would be dangerous to extend," proceeded thus: "I make that observation for this reason, that I think the court, looking at the matter broadly, will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone; and whether it is attempted to enforce these contracts directly by a decree of specific performance, or indirectly by an injunction, appeals to me to be immaterial. It is on the ground that mischief will be done to one at all events of the parties that the court declines in cases of this kind to grant an injunction, and leaves the aggrieved party to such remedy as he may have apart from the extraordinary remedy of an injunction."

[4] In *Pickering* v. *Bishop of Ely* (1843) 2 Y. & C. C. 249, Shadwell, V.C., in refusing an injunction to restrain the defendant from obstructing in his office the plaintiff, a solicitor who had a right to prepare all the leases of lands owned by the See of Ely remarked; "The closest knowledge of all his temporal concerns connected with his See being the necessary consequence of what the plaintiff asserts, it is obvious that it is of the highest importance to the safety of the temporal interests of the bishop for the time being, and his ordinary comfort, that the person invested with such powers should be a man not merely respected by him, not merely worthy of trust, but also personally acceptable to him. To force upon him in such characters a person however estimable, however professionally eminent,

of the general rule, is not restricted to such cases. The element of inexpediency is clearly involved whether it be a question of constraining a person to retain a manager of his business or a groom.

5. Qualification of the general rule where the applicant for relief is in the employment of a body of trustees.—In the exercise of its general jurisdiction over the administration of trusts, a court of equity has in some instances enjoined the trustees of charity schools from dismissing the master, this remedy being granted on the ground that the trustees had abused or exceeded the powers conferred upon them by the express terms of the regulating instrument[1]. But it would seem to be a general rule, that in cases

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who is objectionable to him, or in whom he does not happen to confide, would, if legal, be surely hard; and, sitting in a court of equity, I do not feel any inclination to do it." . . . "I consider it more fit for a court of equity to leave the plaintiff to obtain redress by damages or otherwise in a court of law than to exercise its peculiar jurisdiction by compelling the bishop specifically to submit to the practical exercise of such rights, if rights they are."

This case was cited in a later one where the court refused an injunction to restrain the managing committee of a hospital from interfering with the plaintiff in the performance of his duties as medical officer by suspending him. *Millican* v. *Sulivan* (1888) C.A., 4 Times L.R. 203.

[1] In *Dummer* v. *Chippenham* (1807) 14 Ves. 245, the power of the court to restrain a municipal corporation from abusing its power of dismissing the master of a charity school administered by it, as trustee, was asserted.

In *Willis* v. *Child* (1851) 13 Beav. 117, 20 L.J. Ch. 113, by a scheme of the Court of Chancery for the regulation of a grammar school, authority had been given to the trustees "upon such grounds as they should, at their discretion, in the due exercise and execution of the powers and trusts reposed in them, deem just," to remove the master at once and confirm it at a subsequent special meeting. The trustees having grounds of complaint against the master, referred the matter, without his knowledge, to a committee, who investigated the case in his absence and without his knowledge, and reported against him. The trustees, without communicating the report or hearing him, confirmed it in his absence, and resolved to remove him; and they summoned a second meeting to confirm the resolution. The master then attended and was heard, and the removal was confirmed without any other hearing or inquiry in his presence. The court held, first, that the regulation did not confer upon the trustees an arbitrary power to dismiss the master, upon any grounds which they might deem just, free from any control of the court; and, secondly, that the master had had no proper opportunity afforded him of defending himself—no sufficient means of explanation and no means of proving his defence. The trustees were accordingly restrained by Lord Langdale, M.R., from enforcing the dismissal and ejecting the master. The conclusion of the learned judge with regard to the extent of the powers of the trustees was based upon the considerations,

where the abuse or excess of definite powers is not involved, a court of equity will not examine into the right of such a fuctionary to be retained in his position, unless his interest in the money which constitutes his appointed stipend is of such a nature as to render him the *cestui que trust* of the body controlling the school and the fund from which that stipend is derived [2].

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that the word "trusts" in the clause quoted above was added to the word "powers," for the purpose of keeping in view, that it was a trust for the execution of which the court was providing, and that the employment of the word "trust," especially when viewed with reference to the direction to preserve a statement of the grounds of removal, had the effect of restricting the large meaning of the word "discretion," contained in the earlier part of the clause. He distinguished two earlier cases. In one, *R.* v. *Darlington School* (1844) 6 Q.B. 682, where the governors had power to remove the master and appoint another, "according to their sound discretion," it was held, that the trustees might remove the master as they pleased, and that their discretion was not to be restricted by any opinion which the court might form of the reasons on which they might have been induced to exert it. In the other, *In re Fremington School* (1846) 10 Jur. 512, where the trustees were empowered by the will of the founder of the School, to displace the master, "upon any neglect or misbehaviour in such master or other just cause, for which they or the greater number of them should agree upon and think fit to displace such master," and place another there, Knight Bruce, V.C., held, that the court was to consider, whether there was neglect, misbehaviour or other just cause; that it was not enough for them to say that there was some cause or reason for which they might agree upon and think fit.

[2] In *Whiston* v. *Dean, etc., of Rochester* (1849) 7 Hare 532, it was held that the person appointed by the Dean and Chapter of a Cathedral Church to the mastership of a grammar school which, by the statutes imposed by the founder, was directed to be established and maintained from the endowments of such church which were held in frankalmoigne, was not a *cestui que trust* of the stipend and emolument of the office, but only an officer of the Cathedral Church, appointed to perform one of the duties imposed upon it by the statutes, and that, in such a case, whoever might be visitor—whatever might be the interest of such visitor in the matter in dispute,—or whatever might be the right of the schoolmaster to a mandamus or prohibition at law,—the Court of Chancery could not, in the exercise of its ordinary jurisdiction by bill, try the right of the schoolmaster to his office. Wigram, V.C., said: "If the appointment of the plaintiff as schoolmaster gave him a right to the stipends prescribed by the statutes as a *cestui que trust* against his trustees, there is no question whatever that the mere circumstance of the Dean and Chapter being a corporation or an ecclesiastical body would not remove the case from the jurisdiction of the court. . . . For the purpose of the argument, the founder is considered as saying, that there shall be certain funds, and certain officers payable out of those funds, such as a schoolmaster, choristers, and others, who fill various offices, and perform various duties. All these persons apparently fall within the same category in point of description, although they are unequally paid, and their duties are not of equal importance. Unless it is to be argued that the janitor, for instance, on being discharged, may come to this court and allege a trust in his favour, and call upon the court to decree

6. Enforcement of stipulations by employés not to perform services for any other persons than their employers. English cases reviewed.—In two of the earlier English cases which bear upon this subject, the *ratio decidendi* was that, where a contract of employment embraces both a positive stipulation to serve the employer and a negative stipulation not to serve anyone else, the inability of the court to enforce the contract as a whole by decreeing performance of the positive stipulation was a sufficient reason for refusing to decree performance of the negative stipulation also[1]. But in another case decided in the same year as those referred to this doctrine was declared to be erroneous[2]; and the propriety of

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accordingly, it may be difficult to say that the master, if he be within the same category, has a right to come to the court and allege such a trust."

In *Pottle* v. *Sharp* (C.A. 1896) 75 L.T. 265, the plaintiff was appointed, under a contract terminable at three months' notice, schoolmistress of a school established under a deed of trust. At the time of the appointment all the original trustees were dead, and no successors had taken their places on the board, except the vicar of the parish, who was a trustee *ex-officio*, and who had made the appointment in conjunction with a committee of management who under the trust deed had no right to act. On the ground that the only questions involved were, with whom had the plaintiff contracted, and from whom was she to receive the stipulated notice, the court declined to grant an injunction restraining the committee of management from dismissing her. Her contention that she could not be removed until new trustees had been appointed was rejected. "If," observed Chitty, J., in the lower court, "she was there as the schoolmistress appointed by the manager of the school, the matter resolves itself into a question of personal service."

[1] In *Kemble* v. *Kean* (1829) 6 Sim. 333, where the agreement was, that the defendant should act at Covent Garden Theatre a certain number of nights in the season of 1830-31, and that, in the meantime he should not act elsewhere, an *ex parte* injunction restraining him from acting at Drury Lane Theatre or any other place in London, until he should have completed his engagement with the plaintiff, was dissolved by Shadwell, V.C.

In *Kimberley* v. *Jennings* (1836) 6 Sun. 340, the same judge admitted that a negative covenant might be enforced in a court of equity, if nothing but that covenant remained to be executed, but refused to grant the relief asked on grounds thus stated: "Here the negative covenant does not stand by itself; it is coupled with the agreement for service for a certain number of years, and then for taking the defendant into partnership . . this agreement cannot be performed in the whole, and, therefore, this court cannot perform any part of it."

[2] In *Dietrichsen* v. *Cabburn* (1845) 2 Phill. Ch. 511 (not a contract of service), Lord Cottenham reversed a judgment of the Vice-Chancellor, based upon the ground, that "the court will not prohibit the violation of a negative term in an agreement, unless it has the power of enforcing the positive part of the same agreement." The doctrine adopted was, that the jurisdiction of the court to restrain by injunction an act which the defendant is by

granting or refusing relief in cases which involve the violation of negative stipulations in contracts of services is now determined with reference solely to the general principle of equity jurisprudence, that the court may in the exercise of its discretion enforce by injunction stipulations of this description, which it deems sound and reasonable[3]. That is to say, upon the general rule, that specific performance of a contract of service will not be decreed, there has been engrafted the exception, that, "where a person has engaged not to serve any other master, . . . the court can lay hold of that, and restrain him from so doing"[4]. This doctrine was established in England by the leading case of *Lumley* v. *Wagner*[5], in which Lord St. Leonards, examined at considerable length all the previous decisions bearing upon the question[6]. His conclusion was that an injunction should be

contract bound to abstain from, is not confined to cases in which there are either no other executory terms in the contract, or none which a court of equity has not the means of enforcing.

[3] Chitty in *Lanner* v. *Palace Theatre* (1893) 9 Times L.R. 162.

Compare the following observation of the same judge in *De Francesco* v. *Barnum* (1889) 43 Ch. D. 165: "Injunctions in cases of this kind to restrain a breach of a negative clause in a contract for service is granted because, first, it is a negative clause; and, secondly, because damages are not an adequate remedy, and it is considered right in cases of that kind to interfere directly by preventing a breach, which the person has bound himself not to make. Therefore, as there is no right to sue for damages, there can be no right to an injunction." This statement was approved by Fry, L.J., in 45 Ch. D. 165.

In Story, Eq. Jurispr. § 1343, the effect of the English cases is thus stated: "The violation of contracts for personal services may be restrained by injunction, whenever the legal remedy of damages would be inadequate, and the contract is of such a nature that its negative specific enforcement is possible." But this statement is wanting in precision, as it does not advert to the materiality of the insertion or non-insertion of a negative stipulation in the contract.

[4] Lindley, L.J., in *Whitwood Chemical Co.* (1891) 2 Ch. 416.

[5] (1852) 1 De G. M. & G. 604.

[6] The earliest relevant case, that of *Morris* v. *Colman* (1841) 18 Ves. 437, was thus commented upon by the Chancellor: "There Mr. Colman was a part proprietor with Mr. Morris of the Haymarket Theatre, and they were partners in that concern, and by the deed of partnership Mr. Colman agreed that he would not exercise his dramatic abilities for any other theatre than the Haymarket; he did not, however, covenant that he would write for the Haymarket, but it was merely a negative covenant that he would not write for any other theatre than the Haymarket. Lord Eldon granted an injunction against Mr. Colman writing for any other theatre

granted to restrain the defendant, an operatic singer, from violating an agreement not to sing elsewhere than at the plaintiff's theatre during the period covered by her contract with him. As the basis of this conclusion, he adopted categorically the position, that the court might interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract, and rejected the contention of the defendant's counsel, that a court "ought not to grant an injunction except in cases connected with specific performance, or where, the injunction being to compel a party to forbear from committing an act (and not to perform an act), that injunction will complete the whole of the agreement remaining unexecuted"[7].

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than the Haymarket; and the ground on which Lord Eldon assumed that jurisdiction was the subject of some discussion at the Bar. It was truly said for the defendants that that was a case of partnership; and it was said, moreover, that Lord Cottenham was mistaken in the case of *Dietrichsen* v. *Cabburn* (1846) 2 Phill. 52, when he said that Lord Eldon had not decided *Morris* v. *Colman*, 18 Ves. 437, on the ground of there being a partnership. I agree that the observations which fell from Lord Eldon in the subsequent case of *Clarke* v. *Price*, 2 Wils. 157, show that he did mainly decide it on the ground of partnership; but he did not decide it exclusively on that ground." He expressed his disapproval of the interpretation put upon this case by Vice-Chancellor Shadwell in *Kemble* v. *Kean* (see last section). He stated that *Clarke* v. *Price* (1820) 2 Wils. 157, was not really a case in point, as the contract there under review did not contain any negative stipulation, a circumstance which was clearly fatal to the claim of the plaintiff to the assistance of the court (see, however, section 8, *post*). Finally he expressed the opinion that both *Kemble* v. *Kean* and *Kimberley* v. *Jennings* (see note 1, *supra*), had been wrongfully decided.

[7] The following additional extract from the judgment in this important case may with advantage be quoted: "At an early stage of the argument I adverted to the familiar cases of attorneys' clerks, and surgeons' and apothecaries' apprentices, and the like, in which this court has constantly interfered, simply to prevent the violation of negative covenants; but it was said that in such cases the court only acted on the principle that the clerk or apprentice had received all the benefits, and that the prohibition operated upon a concluded contract, and that, therefore, the injunction fell within one of the exceptional cases. I do not, however, apprehend that the jurisdiction of the court depends upon any such principle; it is obvious that in those cases the negative covenant does not come into operation until the servitude is ended, and, therefore, that the injunction cannot be required or applied for before that period. The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff and the other by the defendants which state of facts may have and in some cases has introduced a very important difference,—but of an act to be done by J. Wagner alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will

The opinion has recently been expressed by a very eminent judge that *Lumley* v. *Wagner* is "rather an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend"[8]. But its authority still remains unimpugned in England, so far as regards the actual decision; and it has been followed more than once where the effect of similar contracts was in question[9].

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break in upon her affirmative covenant—the one being ancillary to, concurrent and operating together with the other. The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract, it is in effect one contract; and though beyond all doubt this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theatre to which she agreed to attach herself. I am of the opinion, that if she had attempted, even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered. Wherever this ocurt has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. . . . It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant J. Wagner from performing at any other theatre while this court had no power to compel her to perform at Her Majesty's Theatre. It is true, that I have not the means of compelling her to sing, but she has no cause of complaint, if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfill her engagement."

[8] Lindley, L.J., in *Whitwood Chemical Co.* v. *Hardman* (1891) 2 Ch. 416 (428).

[9] In *Stiff* v. *Cassell* (1856) 2 Jur. N.S. 348, it was held that a *primâ facie* case was made out for enforcing by injunction an agreement of an author employed to compose tales for a weekly newspaper, that he would write only for publications of a specified class within the period covered by the contract.

That a stipulation by an actor not to act at any other theatre than that of his employer, without permission, may be enforced by injuncion, was held in *Grimston* v. *Cunningham* (1894) 1 Q.B. 125.

See also the two cases reported under the caption, *Lanner* v. *Palace Theatre* (1893) 9 Times L.R. 162. The facts are stated in § 1, note 5, *supra*.

In *Donnell* v. *Bennett* (1883) 22 L.R. Ch. Div. 835 (a case relating to the sale of chattels), Fry, J., after referring to certain earlier decisions, remarked: "They appear to me to shew that in cases of this description

It is now settled that the principle of *Lumley* v. *Wagner* ought not to be applied to an agreement which, though negative in form, is affirmative in substance[10].

7. Same subject. American cases reviewed.—In some of the earlier American cases the courts applied or recognized the doctrine, that an injunction should not be granted to restrain the breach of a negative stipulation in a contract of service[1]. In the form in

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where a negative clause is found, the court has enforced it without regard to the question whether specific performance could be granted of the entire contract." He declined to attach any importance to the point made by counsel, that in all those cases the negative contract enforced was but a part of a larger contract,—was a separable part of that larger contract, and that those cases did not apply to a case like the one before the court, in which the negative contract was co-extensive with the positive contract. He considered that the positive and negative stipulations in *Lumley* v. *Wagner*, *supra*, were substantially co-extensive, and pointed out that Lord St. Leonards did not dwell on the distinction which it was now sought to draw, and that, so far as he was aware, no trace of it was to be found in the earlier authorities.

[10] *Davis* v. *Foreman* (1894) 3 Ch. 654. There an agreement for the employment of a manager of a business contained a clause providing that the employer would not, except in the case of misconduct or a breach of the agreement, require the manager to leave his employ. The employer gave to the manager notice purporting to determine the agreement and the service created thereby, and the manager brought an action for an injunction to restrain the employer from acting on the notice. *Held*, that the clause above mentioned was equivalent to a stipulation by the employer that he would retain the manager in his employ, and that an injunction ought not to be granted. Kekewich, J., laid it down as settled law, that an agreement for personal service cannot be enforced otherwise than by an action for damages, except in certain cases where there is a strictly negative stipulation. But in view of the remarks of Lord Selborne and Lindley, L.J., referred to in § 8, *post*, this statement is evidently wanting in precision.

[1] In *Hamblin* v. *Dinneford* (1835) 2 Edward's Ch. 529, a preliminary injunction to restrain the breach of a provision binding an actor not to perform during a certain period at any other theatre than that of the plaintiff was denied, on the grounds, that the controversy was a matter merely between employer and employé, which should be left to a court of law, that the imprisonment of the defendant for contempt, the only means of enforcing the injunction would defeat the very object aimed at by the plaintiff, and that the only relief that could be given would be restrictive in its nature and leave the positive part untouched. This decision was rendered before *Kemble* v. *Kean* (see last section), but the court took the same view of the effect of *Morris* v. *Colman* (1811) 18 Ves. 437, as was taken by Shadwell, V.C., in that case, viz.: that its actual *ratio decidendi* was the existence of a partnership between the plaintiff and defendant;—a theory which, as has been shown in the preceding section has been repudiated in England.

In *Sanquirico* v. *Benedetti* (1847) 1 Barb. 315, where an injunction

which it was originally propounded, that doctrine is now obsolete. As will be shown in a subsequent section, the development of judicial opinion with respect to the jurisdiction of courts of equity to enforce such a stipulation has in the United States proceeded along lines essentially different from those indicated by the English decisions.

8. Absence of express negative stipulation, to what extent a bar to exercise of equitable jurisdiction. English cases reviewed.—In one case the principle upon which Lord Eldon proceeded in refusing an injunction to restrain the breach of a contract which contained no negative stipulation was, that, "it would be against the meaning of the agreement to affix to it a negative quality and import a covenant into it by implication"[1]. In a leading decision the effect of which has been stated in § 6, *ante*, this principle was explicitly approved by Lord St. Leonards[2]. But, in spite of this clear expression of his opinion, some remarks made by him in another part of his judgment were subsequently construed as indicating that he considered it to be permissible for a court under some circumstances to read into a contract an implied negative stipulation, and to grant relief on the same footing as if the defendant had expressly bound himself not to render services to other persons. The doctrine embodied in the decisions which were based upon the assumption that this was the correct construction of his language may apparently be stated in some such form as this: For the purpose of laying a foundation for

against an opera singer was refused, the court relied upon *Hamblin* v. *Dinneford* and *Kemble* v. *Kean*.

In *Burton* v. *Marshall* (1849) 4 Gill. (Md.) 487, the court referred to the decisions in *Kemble* v. *Kean* and *Kimberley* v. *Jennings*, as furnishing as a *fortiori* ground for declining to enforce a contract which did not contain a negative stipulation.

[1] In *Lumley* v. *Wagner* (see below), this was said to be the rationale of *Clarke* v. *Price* (1820) 2 Wils. 157, (defendant violated his agreement to take notes of cases in the Court of Exchequer, and compose reports for the plaintiff).

[2] *Lumley* v. *Wagner* (1852) 1 De G. M. & G. 604. At p. 622, the learned judge said: "I may at once declare that if I had only to deal with the affirmative covenant of the defendant, J. Wagner, that she would perform at Her Majesty's Theatre, I should not have granted any injunction."

the exercise of equitable jurisdiction, a negative stipulation may be implied, whenever it is a reasonable inference from the terms of the affirmative portion of the agreement, that the parties contracted on the understanding, that the employé was not to render service to anyone except the employer. Such an inference might, it was held, be properly drawn, where the employé had bound himself to give his whole time to the employer, or to work exclusively for the employer, or to render certain definite services on specified premises[3].

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[3] In *Montague* v. *Flockton* (1873) L.R. 16 Eq. 189, Malins, V.C., stated his conclusions and the reasons therefor in the following terms: "It appears to me, on the plainest ground, that an engagement to perform for nine months at Theatre A. is a contract not to perform at Theatre B., or at any other theatre whatever. How is a man to perform his duty to the proprietor of a theatre if, when he has engaged himself to perform for him, he is to go away any night that he may be wanted to another theatre? I must treat Mr. Flockton as if he were the greatest actor in the world, and as if wherever he went the public would run after him; and according to this, if a proprietor engages an actor to perform for him, he is not, because he is only wanted for three nights in the week, to be at liberty to go and perform at any other theatre during the other three nights, and thereby take away the advantage of the contract which he has entered into with his employer. That, in my opinion, is utterly inconsistent with the proper construction of the contract." The learned judge relied upon two other cases in which the same view, that an engagement to act at one theatre is an implied prohibition against acting at any other, had been taken, viz., *Webster* v. *Dillon* (1857) 3 Jur. N.S. 432 (a decision rendered by Page-Wood, V.C. (afterwards Lord Hatherley), upon the assumption that he was sustained by the authority of Lord St. Leonards, and *Fechter* v. *Montgomery* (1863) 33 Beav. 227, a decision by Lord Romilly, who construed a contract in which there was no negative stipulation, as importing an agreement on the part of the plaintiff to employ the defendant to act at a certain theatre, and on the part of the defendant to perform nowhere else without the plaintiff's consent, but refused to enforce the latter agreement on the ground that the plaintiff had kept the defendant idle for five months (see §3, note 7, *ante*).

See also *Jackson* v. *Astley* (1883) 1 C. & E. 181, where Pollock, B., observed, with regard to a contract to serve the plaintiff for a specified term, as the manager of his business, that, under appropriate circumstances, its breach might have been enjoined, although it contained no express negative covenants. But he declined under the circumstance to exercise his discretionary power.

In view of the explicit and categorical statement of Lord St. Leonards already referred to in the preceding note, it is difficult to understand how the theory as to the effect of *Lumley* v. *Wagner* which these cases embody can have originated. In *Montague* v. *Flockton*, *supra*, Malins, V.C., said that he relied chiefly upon the following passage of the Lord Chancellor's judgment: "In all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre." Another passage which has some bearing upon the point is that in which the Lord Chancellor observed that the

The cases decided upon this footing have been overruled by the Court of Appeal, which declared them to have been based upon a misapprehension as to the meaning of the words of Lord St. Leonards[4]. But in estimating the actual position taken by

defendant would have violated her agreement by singing elsewhere, even if there had been no negative stipulation. But, as Kay, L.J., remarked in the case cited in the next note, neither of these passages can reasonably be regarded as susceptible of the construction put upon them. Having regard to the explicit declaration of Lord St. Leonards above referred to, it is clear that his statement that, even the absence of an express negative stipulation, a violation of the contract on the defendant's would have been predicable, could not have been intended to bear the meaning, that this breach was a proper subject for equitable interference.

[4] *Whitwood Chemical Co.* v. *Hardman* (1891) 2 Ch. (C.A.) 428. There the manager of a manufacturing company agreed to give during a specified term "the whole of his time to the company's business." The judgment of Kekewich, J., who granted an injunction, proceeded upon the ground that, having regard to the terms of the contract, it was a case in which a negative stipulation was expressed, and that it was not necessary to deal with the rights of the parties on the hypothesis that such a stipulation, if it was to be read into the contract must be a matter of implication. In the higher court it was held, that, (whatever other remedies the company might have), in the absence of any negative stipulation in that behalf, they were not entitled to an injunction to restrain the manager from giving during the term, part of his time to a rival company. Lindley, L.J., said: "The first point to observe is, that there is no negative covenant at all, in terms contained in the agreement on which the plaintiffs are suing—that is to say, the parties have not expressly stipulated that the defendant shall not do any particular thing. The agreement is wholly an affirmative agreement, and the substantial part of it is that the defendant has agreed to give 'the whole of his time' to the plaintiff company. That is important in this respect, that it enables us to see more clearly than we otherwise might what the parties had in their contemplation. If there had been a negative clause in this agreement, such as there was in *Lumley* v. *Wagner*, 1 De G. M. & G. 604. and in some of the other cases, we should have been relieved from the difficulty of speculating what they had been thinking about. We should have seen that they had had their attention drawn to certain specific points, and that they had come to an agreement upon those specific points. Now every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will not be anywhere else at the same time, and so on *ad infinitum;* but it does not at all follow that, because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else which is inconsistent with it. The court has never gone that length, and I do not suppose that it ever will. . . . What injunction can be granted in this particular case which will not be, in substance and effect, a decree for specific performance of this agreement? It appears to me the difficulty of the plaintiffs is this, that they cannot suggest anything which when examined, does not amount to this, that the man must either be idle, or specifically perform the agreement into which he has entered. Now there, it appears to me, the case goes beyond *Lumley* v. *Wagner*, and every case except *Montague* v. *Flockton*, Law Rep. 16 Eq. 189. The principle is that the court does not decree

that court, it is important to note that, although the broad theory, that an affirmative agreement to perform certain services for a specified person or on specified premises during a stated period always involves by implication a negative stipulation not to perform similar services for any other person during that period, was emphatically repudiated, Lindley, L.J., expressed his concurrence with the remarks of Lord Selborne in a somewhat earlier case, to the effect that "the principle (applied in *Lumley* v. *Wagner*) does not depend upon whether you have an actual negative clause, if you can say that the parties were contracting in the sense that one should not do this, or the other,—some specific thing upon which you can put your finger"[5]. As the English

specific performance of contracts for personal service, and the question is, whether there is anything in this case which takes it out of that principle. I cannot see that there is." Referring to *Montague* v. *Flockton*, upon which reliance had been placed, he added: "I cannot read the decision of Malins, V.C., without seeing that he was under the impression that Lord St. Leonards in *Lumley* v. *Wagner* would have granted the injunction, even if the negative clause had not been in the contract. This was a mistake. Lord St. Leonards was very clear and explicit on that subject." Kay, L.J., said: "What strikes me in this case is that, if the court could possibly interfere in the way in which the learned judge has interfered, by injunction, I do not see any contract of hiring and service in which it ought not also to interfere. To take the most simple and ordinary case, of a man's domestic servant, his butler (which was one of the cases put by way of illustration in one of the judgments referred to), who has contracted to give the whole of his time to his master's service. Could it be possibly argued that an injunction could be obtained to prevent his serving some one else during that engagement? Yet if a negative is to be implied, I do not see any case whatever in which it could be more clearly implied than in a case of that kind. We must tread with very great caution such a path as that which this application invites us to pursue; and, as I think this case goes very far beyond any other case which has been decided with consideration up to this time, I certainly am very strongly disinclined to support this decision; I am all the more disinclined to support it, because one cannot help seeing that the mode in which this injunction is granted is really the only mode in which the court could possibly have granted such an injunction. The court has implied a negative in the contract to give the whole of his time, and has therefore granted an injunction to prevent his giving any of his time to any other purpose. It is not really wanted, *bonâ fide*, for that purpose, but it is wanted to prevent him from setting up a rival business which he has not contracted not to do."

[5] This statement is intended to express the essence of a passage in Lord Selborne's judgment in *Wolverhampton & W. R. Co.* v. *London & N. W. R. Co.* (1873) L.R. 16 Eq. 433 (440). After referring to the case of *Lumley* v. *Wagner*, he proceeded thus: "It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground, and to extend to it an ordinary case of hiring and service, which is not properly a case of specific performance; the technical distinction being made

authorities now stand, therefore, it is apparent that the doctrine of an implied negative stipulation has not been rejected *in toto*. In fact it is obvious that no other position could be taken without doing violence to the cardinal principle of equity jurisprudence, that, in determining the effect of a contract, the substance, not the form, is to be considered.

9. Same subject. American cases reviewed.—The view embodied in a few American cases is the same as that applied by the English courts, viz., that, generally speaking, upon a contract affirma-

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that if you find the word 'not' in an agreement—'I will not do a thing'—as well as the word 'I will' even although the negative term might have been implied from the positive, yet the court refusing to act on the implication of the negative, will act on the expression of it. I can only say that I think it was the safer and the better rule, if it should eventually be adopted by this court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the court to go to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such that the remedy ought to be sought elsewhere, then I do not think that the forum ought to be changed by the use of a negative rather than an affirmative."

This was one of the cases cited by Fry, J., in *Donnell* v. *Bennett* (1883) L.R. 22 Ch. Div. 835, in support of his suggestion that the tendency of recent decisions had been towards this view, "that the court ought to look at what is the nature of the contract between the parties; that if the contract as a whole is the subject of equitable jurisdiction, then an injunction may be granted in support of the contract, whether it contains or does not contain a negative stipulation; but that if, on the other hand, the breach of the contract is properly satisfied by damages, then that the court ought not to interfere whether there be or be not the negative stipulation. That, I say, appears to me to be the point towards which the authorities are tending, and I cannot help saying that in my judgment that would furnish a proper line by which to divide the cases." Compare also the similar remarks of the learned judge in his work on Spec. Perf. (3rd Ed.) p. 396, § 862. But this forecast as to the trend of judicial opinion is not sustained by the more recent decisions cited in this section and in § 8. From those decisions, it is apparent that the courts still attach a controlling importance to the fact, that the contract does or does not contain a negative stipulation.

In *Mutual Reserve Fund L. Asso.* v. *New York L. Ins. Co.* (C.A. 1896) 75 L.T. 528, where *Whitwood, etc., Co.* v. *Hardman, supra*, was followed, the court laid down the following rule: "Before an injunction can be granted, in order to enforce a written contract of personal service, there must be a clear and definite negative covenant, or if one is to be implied, which is quite possible, it must be so definite that one can see exactly the limit of the injunction to be granted." The conclusion was that from a contract by an agent to "act exclusively for" his employer a negative covenant not to do business for other employers could not be implied.

tive in all its provisions, the execution of which could not be enforced in equity, a court of equity will not engraft a negative stipulation, and restrain its breach by injunction [1].

In some States the doctrine as to the justifiability of implying a negative stipulation has been stated in that extreme form which has now been discredited in England [2]. But as the American courts limit the application of the doctrine to cases in which the services are special in the sense explained in § 11, *post*, their actual position is not the same as that of English judges.

10. Quality of the services, how far a material element: English authorities examined.—In one case Kekewich, J., observed, arguendo, that the rationale of the interference of courts of equity for the purpose of preventing a violation of their contracts by singers, actors, and other artists is, that, such employés possess special capabilities for a certain kind of work, and that it is for this reason peculiarly difficult to replace them [1]. The Court of

[1] In *Burton* v. *Marshall* (1846) 4 Gill (Md.) 487, 14 Am. Dec. 171, the court refused either to restrain an actress from performing at another theatre, or her husband from permitting her to change her residence; or another manager from giving her employment within the term, as an actress. The court distinguished the decision in *Morris* v. *Colman* (1811) 18 Ves. 437, on the ground that it related to a contract containing a negative stipulation. It is interesting in a historical point of view to observe that this Maryland case was decided before *Lumley* v. *Wagner* (see § 6, *ante*).

A similar decision as to a danseuse was rendered in *Butler* v. *Galletti* (1861) 21 How. Pr. 465.

In *Mapleson* v. *Del Puente* (1883) 13 Abb. N.C.C. 144, the court expressed a doubt whether the plaintiff, an operatic manager, was entitled to restrain the defendant, a singer, from the commission of acts not specifically prohibited in a negative clause. But the point was not decided.

[2] In *Cort* v. *Lessard* (1887) 18 Or. 221, the court, upon the authority of *Montague* v. *Flockton* (§ 8, *ante*) which had not then been overruled in England, expressed the opinion that, "in the nature of things, a contract to act at a particular theatre for a specified time necessarily implies a negative against acting at any other theatre during that time. The agreement to perform at a particular theatre for a particular time of necessity involves an agreement not to perform at any other during that time."

In *Hoyt* v. *Fuller* (N.Y. Super. Ct. 1892) 19 N.Y. Supp. 962, 47 N.Y. S.R. 504, the court remarked: "The contract was intended to give the plaintiffs, not the divided, but exclusive services, of the defendant, and where that is apparent, a negative clause is not necessary to secure that result.

[1] *Whitwood Chemical Co.* v. *Hardman* (1891) 2 Ch. 416. In one passage the learned judge remarked: (p. 420): "There are also cases, of which *Lumley* v. *Wagner* (§ 6, *ante*) is an example, where the employé is an

Appeal reversed the decision of the learned judge, asserting the right of the employer to enjoin the employé, (see § 8, *ante*), but did not make any comment upon this explanation of the decisions referred to by him. The precise scope of his remarks is not entirely clear. But if they are to be construed as embodying the theory that the special quality of the services to be rendered is a determinative element, in the sense that the jurisdiction of courts of equity is dependent upon its presence, his view is not borne out by the authorities. In the first place, a theory which would attach to this element a differentiating effect of this description is quite inconsistent with the rationale of later cases in which the court has enjoined or refused to enjoin the breach of negative stipulations in contracts for services which did not demand any special capacity[2]. In the second place it is to be observed that, neither in the decision particularly mentioned by Kekewich, J., nor in any other, has any language been used which can fairly be interpreted as indicative of an adoption of his view. All the judgments of the courts have been rendered with reference solely to the consideration, that the given contract did, or did not, embrace a negative stipulation, express or implied[3].

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artist, having special knowledge, special powers, or special abilities, which he or she has engaged to give up and use for the benefit of the employer. That is the foundation of such cases as *Lumley* v. *Wagner*. It is because the defendant in a case of that kind is an artist who cannot easily be replaced that such an action is brought." In another place (p. 423) he approved the decision in *Montague* v. *Flockton* (§ 8, *ante*), on the ground that "an actor is also an artist a man with special powers, special abilities."

[2] In *Lanner* v. *Palace Theatre* (1893) 9 Times L.R. 162, 165, a teacher of ballet-dancing was held by Chitty, J., to be entitled to enjoin two of her pupils from violating a negative stipulation (see § 2, note 5, and § 6, note 8, *ante*).

In *De Francesco* v. *Barnum* (1890) 43 Ch. D. 165, 45 Ch. D. 430, an injunction in a similar case was refused by the same judge, but simply on the ground that the contract was unfair. See § 2, note 5, *ante*.

[3] The very general language in which Chitty, J., in the cases cited in last note, summed up the effect of the authorities has already been stated. See § 6, *ante*.

The following remarks as to the extent of the jurisdiction of courts of equity with regard to the enforcement of negative stipulations are also extremely significant in the present connection, although the contracts involved did not relate to service.

"If the bill states a right or title in the plaintiff to the benefit of the

11. Same subject. American doctrine.—(*a*) *Generally*—The theory of which, as stated in the preceding section, Kekewich, J., seems to be the sole exponent in England has taken firm root in the United States. In a large number of cases it has been held that, where the assistance of equity is sought to restrain an employé from entering into engagements with a third person, an injunction should be granted or refused, according as the stipulated services do, or do not belong to a category indicated by such descriptive phraseology as this: "unique"[1]; "special, unique, and extraordinary"[2]; "unique, individual, and peculiar"[3]; "individual and peculiar, because of their special merit or unique character"[4]; "requiring and presupposing a special knowledge, skill, and ability in the employé"[5]. The effect of the decisions rendered with reference to this doctrine is stated below[6].

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negative agreement of the defendant, or of his abstaining from the contemplated act, it is not, I conceive, material whether the right be at law, or under an agreement which cannot be otherwise brought under the jurisdiction of a court of equity." Lord Cottenham in *Dietrichsen* v. *Cabburn* (1846) 2 Phill. Ch. 52 (58).

"If there is a negative covenant, the court has no discretion to exercise. If the parties for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say by way of injunction that the thing shall not be done." Lord Cairns, in *Doherty* v. *Alman* (1876) 3 App. C. 720.

[1] *Philadelphia Ball Club* v. *Lajoie* (1902) 202 Pa. 210.

[2] *Bronk* v. *Riley* (1888) 50 Hun. 489; *Strobridge Lith. Co.* v. *Crane* (1890) 58 Hun. 611 (memo.), 35 N.Y.S.R. 473, 12 N.Y. Supp. 898; *Hoyt* v. *Fuller* (N.Y. Super. Ct. 1892), 19 N.Y. Supp. 962, 47 N.Y.S.R. 504; *Rogers Mfg. Co.* v. *Rogers* (1890) 58 Conn. 356.

All the courts which have used this particular combination of words seem to have derived it from the following passage in 4 Pomeroy Eq. Jurispr., § 1343: "Where a contract stipulates for special, unique, or extraordinary, personal services or acts, or for such services or acts to be rendered or done by a party having special unique and extraordinary qualifications, . . . the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same or the same kind of services or acts elsewhere, or by employing any other person."

[3] *Jacquard Jewelry Co.* v. *O'Brien* (1897) 70 Mo. App. 432.

[4] *Burney* v. *Ryle* (1893) 91 Ga. 707.

[5] Pomeroy, Spec. Perf. (2nd Ed.) § 24, adopted in *Universal Talking-Mach. Co.* v. *English* (1891) 34 Misc. 342, 69 N.Y. Supp. 813; *Philadelphia Ball Co.* v. *Lajoie* (1902) 202 Pa. 210.

[6] (*a*) *Injunction granted.*—In *Hayes* v. *Willio* (1871) 11 Abb. (N.Y.) Pr. N.S. 167, where an actor was enjoined from violating a stipulation not

If the views which the present writer has propounded in the preceding section with regard to the rationale of the English

to perform elsewhere, the court argued thus: "It is indisputable, that when theatrical managers with large capital invested in their business, making contracts with performers of attractive talents, and relying upon such contracts to carry on the business of their theatres, are suddenly deserted by the performers in the middle of their season, the resort to actions at law for damages must fail to afford adequate compensation. It is not always that the manager is deprived of his means of carrying on his business, but that his performers, by carrying their services to other establishments, deprive him of the fruits of his diligence and enterprise, increase the rivalry against him, and cause him an injury. It is as much his right, if he have a contract to that effect, that no other establishment shall have the services of his performers, as that he shall have them himself. There is no hardship to the actors in preventing the breach of the negative part of their contract, for every man has the right to expect to be held to his agreement when it was entered into without fraud, and he receives the consideration he demands, and his contract entitles him to." This decision was reversed (1872) 4 Daly 259; on the ground that the plaintiff, being merely the assignee of the rights of the party with whom the defendant had made a contract under which he was to go to any place of amusement to which that party might send him, had no right to maintain the suit. The remarks of the lower court, so far as they are relevant to the present subject, were in nowise impugned.

In *Daly* v. *Smith* (1874) 38 N.Y. Super. Ct. 158, 49 How. Pr. 150, the defendant who had agreed among other things to act on the stage of plaintiff's theatre, during three seasons, all such parts and characters as the plaintiff might direct, and that without the plaintiff's consent, she would not act at any other place in the city of New York during the period covered by the contract was enjoined from accepting an engagement to play during the ensuing season at another New York theatre. The decision was put upon the ground that, under the circumstances there was no adequate remedy at law, where attractive public performers suddenly desert their employers in the middle of their season, since they increase the rivalry against him by joining other establishments. The remarks of Daly, J., to this effect in *Hayes* v. *Willio*, *ubi supra*., were approved.

This case was relied upon in *M'Caull* v. *Braham* (1883) 16 Fed. 37, where the court formulated the following rule: "Contracts for the services of artists or authors of special merit are personal and peculiar; and when they contain negative covenants which are essential parts of the agreement, as in this case, that the artists will not perform elsewhere, and the damages, in case of violation, are incapable of definite measurement, they are such as ought to be observed in good faith and specifically enforced in equity."

In *Canary* v. *Russell* (1894) 9 Misc. 558, 61 N.Y.S.R. 665, 30 N.Y. Supp. 122, the court, remarking that the jurisdiction of a court of equity to enforce negative stipulations in the case of actors was well established, granted an injunction to restrain an operatic singer from performing for another manager during the second of two seasons during which the plaintiff was entitled to command the defendants' services, upon exercising the option given by the contract. It was, however, held that the restriction was not applicable to the summer months intervening between the two seasons.

In *Philadelphia Ball Club* v. *Lajoie*, 51 Atl. 973, 202 Pa. 210, the court thus stated its reasons for granting an injunction to restrain a professional base-ball player who had sold his services to the plaintiff for a certain period

decisions, be correct, it is manifest that the doctrine discussed in this section indicates a severance of the currents of English and

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from accepting employment from another club. "The evidence in this case justifies the conclusion that the services of the defendant are of such a unique character, and display such a special knowledge, skill, and ability as renders them of peculiar value to the plaintiff, and so difficult of substitution, that their loss will produce irreparable injury, in the legal significance of that term, to the plaintiff. The action of the defendant in violating his contract is a breach of good faith, for which there would be no adequate redress at law, and the case therefore properly calls for the aid of equity, in negatively enforcing the performance of the contract, by enjoining against its breach."

In *Metropolitan Exhibition Co.* v. *Ewing* (1980) 42 Fed. 198, where a base-ball player was restrained from violating a negative promise, the court stated it was applying the "generally recognized doctrine" that "while a court of equity will not ordinarily attempt to enforce contracts which cannot be carried out by the machinery of a court, like that involved in the present case, it may nevertheless practically accomplish the same end by enjoining the breach of a negative promise."

In *Metropolitan Exch. Co.* v. *Ward* (1890) App. D. 9 N.Y. Supp. 779, 24 Abb. N.C. 393, the power of the court to enforce a restrictive provision against a base-ball player was asserted; but the circumstances were held not to justify a preliminary injunction.

In *Daly* v. *Smith, supra*, a special point was raised by the fact, that it was expressly stipulated in the contract that if the defendant should refuse to fulfill her part, and should attempt to perform at any other theatre before the termination of her agreement with the plaintiff, the plaintiff might by legal process or otherwise, restrain her from so performing, on payment to her, during such restraint, of a sum equal to one-quarter of the salary to be paid to her under the contract, in lieu of her salary. The court, referring to the general rule that parties cannot confer jurisdiction by stipulation, refused to interfere with this arrangement for the reason that, as the jurisdiction existed wholly irrespective of the clause, it was competent for the parties to agree upon the terms of restraint in a proper case, like the one under review.

(*b*) *Injunction refused.*—In *Rogers* v. *Rogers* (1890) 58 Conn. 356, 20 Atl. 467, the defendant agreed that he would serve the plaintiffs for twenty-five years under the direction of their general manager, travelling for them as directed, and rendering such services in the capacity of a secretary or other officer as they might desire; and that he would not be engaged, or allow his name to be used, in any other hardware or cutlery business, either as manufacturer or seller, but would give his entire time and services to the interests of the plaintiffs. In a suit for an injunction against the defendant's leaving the employment of the plaintiffs and engaging in any other hardware or cutlery business, or allowing his name to be used in any such other business, in which the plaintiffs set out the defendant's contract and averred that his services had, by his familiarity with their business and customers, become of special value to them, that he was negotiating with certain rival manufacturers to go into their service and to allow his name to be used as a stamp upon their wares, and intended to use for their advantage his knowledge of the plaintiffs' business, and that his doing so would cause irreparable damage to the business of the plaintiffs, the court refused to grant the relief asked for, saying: "These services, while they may not be material and mechanical, are certainly not purely intellectual, nor are they special, or unique, or extraordinary; nor are they so peculiar or individual that they could not be performed by any person of ordinary

American authority. Yet it seems impossible to draw from the language used by most of the American courts which have adopted the doctrine any other inference than that they supposed themselves to be following the English precedents[7].

(*b*) *To what descriptions of services the doctrine is applicable.*—In some of the cases in which this doctrine has been applied or recognized, the view has been advanced that the only

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intelligence and fair learning." The other points decided were (1) that it did not appear that the plaintiffs had a right to the defendant's name as a trade-mark, and that if they had, they could have no difficulty in protecting their ownership of it; and (2) that it did not appear that the use of the defendant's name by other manufacturers would do the plaintiffs any injury beyond what might grow out of a lawful business rivalry; and that if, by reason of extraneous facts, such use would be wrongful or specially injurious, such facts ought to have been set out, so that the court might pass upon them.

In *Burney* v. *Ryle* (1893) 91 Ga. 701, the defendant had assigned to a firm his interest in a certain contract of agency for an insurance company, and in the assignment covenanted to remain with the firm as special agent in a named State for one year, and to give his entire time and attention to the business of that company by procuring for it applications for insurance. *Held*, that an injunction would not be granted at the instance of the firm to restrain the assignor from soliciting insurance or transacting business for a rival company,—the assignment containing no express covenant that he would not do so, and it not appearing that he was specially skillful, successful, or expert, insurance agent whose place could not be readily supplied by another equally competent to attend to the business for which his services had been engaged.

For other cases in which an injunction was refused see *W. L. Johnson Co.* v. *Hunt* (1892) 66 Hun. 504, 50 N.Y.S.R. 104, 21 N.Y. Supp. 314 (advertising solicitor: Barrett, J., dissented on the ground that defendant had by his long connection with plaintiff acquired a special knowledge of the business); *Jacquard Jewelry Co.* v. *O'Brien* (1897) 70 Mo. App. 432, (jewelers' travelling salesman).

[7] In *Rogers Mfg. Co.* v. *Rogers* (1890) 58 Conn. 356, the authority cited for the refusal of an injunction in a case where the services were not of a special character was *Lumley* v. *Wagner* (see § 6, *ante*).

A similar misapprehension as to the rationale of this decision is traceable in *Daly* v. *Smith* (1874) 38 N.Y. Super. Ct. 158, 49 How. Pr. 150, where the court professed to follow it, although the quality of the services was the controlling factor.

For other cases in which that decision was cited, but in which the courts determined the rights of the parties with reference to the quality of the services, see *Fredericks* v. *Mayer* (1857) 13 How. Pr. 566; *Bronk* v. *Riley* (489) 50 Hun. 489; *Metropolitan Exch. Co.* v. *Ward* (1890) 9 N.Y. Supp. 779, 24 Abb. N.C. 393; *Cort* v. *Lassard* (1887) 18 Or. 221.

In *Jacquard Jewelry Co.* v. *O'Brien* (1897) 70 Mo. App. 432, it was observed that the doctrine of *Lumley* v. *Wagner* had received only a qualified indorsement in the United States. So far as the present writer is aware, this is the only remark in any of the reports which indicates an appreciation of the fact that the positions of the courts in England and America are different.

services to which it can properly be deemed applicable are those which are wholly or principally concerned with the exercise of the intellectual faculties[8]. But there is manifestly no satisfactory ground upon which this method of classification can be sustained. The damage arising from the desertion of such an employé as a highly skilful dancer or acrobat may well be, and, as a matter of fact, frequently is, as irreparable as the damage caused by the abandonment of their contracts by authors, artists, or actors[9]. The preferable conception is that the appropriate criterion for determining the category to which the services belong is supplied by the answer to the question, "whether a substitute for the employé can readily be obtained, and whether such substitute will substantially answer the purpose of the contract . . . since where a proper substitute can readily be secured, and the service demands no exclusive individuality, the

[8] *Fredericks* v. *Mayer* (1857) 13 How. Pr. 566, 571; *Butler* v. *Galletti* (1861) 21 How. Pr. 466; *Daly* v. *Smith* (1874) 38 N.Y. Super. Ct. 158, 49 How. Pr. 000; *Burney* v. *Ryle* (1893) 91 Ga. 701.

[9] In *Metropolitan Exch. Co.* v. *Ward* (1890) 9 N.Y. Supp. 779, 24 Abb. N.C. 393, the court said: "Between an actor of great histrionic ability and a professional base-ball player, of peculiar fitness and skill to fill a particular position, no substantial distinction in applying the rule laid down in the cases cited can be made. Each is sought for his particular and peculiar fitness, each performs in public for compensatioh, and each possesses for the manager a means of attracting an audience. The refusal of either to perform according to contract must result in loss to the manager, which is increased in cases where such services are rendered to a rival."

The power of the court to grant injunctions against base-ball players was also asserted in *Philadelphia Ball Club* v. *Lajoie* (1902) 202 Pa. 210, 51 Atl. 973; *Metropolitan Exhibition Co.* v. *Ward* (Sup. Ct.) (1890) 24 Abb. N. Cas. 393, 9 N.Y. Supp. 779.

In *Cort* v. *Lassard* (1887) 18 Or. 221, where an acrobat was concerned, the court repudiated the criterion suggested in *Fredericks* v. *Mayer* and *Butler* v. *Galletti*, *supra*.

The doctrine that cases in which the services are intellectual constitute merely one class among several in which equitable interference is proper is also distinctly embodied in the following passage: "Where a contract stipulates for special, unique or extraordinary personal services or acts, or where the services to be rendered are purely intellectual, or are peculiar and individual in their character, the court will grant an injunction in aid of a specific performance. But where the services are material or mechanical, or are not peculiar or individual, the party will be left to his action for damages." *Wm. Rogers Mfg. Co.* v. *Rogers* (1890) 58 Conn. 356 (364).

In *Jacquard Jewelry Co.* v. *O'Brien* (1897) 70 Mo. App. 432, the court observed that the doctrine is applicable both to services of an intellectual character, and to those of a mechanical nature which require special skill.

reason for this exceptional departure from common-law principles fails, and the parties should be left to their ordinary remedies" [10].

By the adoption of this criterion the main doctrine is limited to this extent, that the fact that a defaulting employé possesses special knowledge will not entitle his employer to an injunction, unless it is affirmatively shown by the employer that such skill cannot be supplied by others [11].

In some of the cases under this head that phase of "irreparability" which is referred to the conception of the impossibility of estimating with reasonable precision the damage which the breach of contract will produce, is adverted to as one of the grounds of the equitable jurisdiction exercised. [12]. As that impossibility is predicable in almost every instance in which the services are special and unique, it will ordinarily constitute merely a cumulative reason for issuing an injunction. But it has been held that, if the services are not of that character, the fact that the damages cannot be computed upon any accurate footing will not of itself justify such relief [13].

(*c*) *Doctrine applicable, whether the contract does or does not embrace a negative stipulation.*—In what appear to be the

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[10] *Strobridge Lithographing Co.* v. *Crane* (1890) 12 N.Y. Supp. 898 (court refused to issue an injunction against a somewhat talented young lithographic sketcher).

"One who has engaged a great actor can procure no substitute, if the actor breaks his engagement and performed elsewhere; while if a salesman leaves his employer it will be easy to supply his place." *Bronk* v. *Riley* (1888) 50 Hun. 489.

The impossibility or extreme difficulty of procuring substitutes for persons of unique talents is also adverted to in *Duff* v. *Russell* (1891) 28 Jones & Sp. 80, 14 N.Y. Supp. 134; *Cort* v. *Lassard & Lucifer* (1889) 18 Or. 221; *Philadelphia Ball Club* v. *Lajoie* (1902) 202 Pa. 210, (citing Pomeroy, Spec. Perf. p. 31); *Burney* v. *Ryle* (1893) 91 Ga. 701 (citing Beach Mod. Eq. Jurispr., § 772); *Edwards* v. *Fitzgerald* (N.Y. Sup. Ct. 1895) 9 Nat. Corp. Rep. 455.

[11] *Universal Talking Mach. Co.* v. *English* (1901) 69 N.Y. Supp. 813, 34 Misc. Rep. 342, the court declined to the breach of his contract by a man employed to develop and perfect improved processes for recording and reproducing sound.

[12] See, for example, *Fredericks* v. *Mayer* (1857) 13 How. Pr. 566; *Burney* v. *Ryle* (1893) 91 Ga. 703.

[13] Such was the situation in *Kessler* v. *Chappelle* (1902) 73 App. D. 447, 77 N.Y. Supp. 285 (see note 16, *infra*).

earliest cases in which the quality of the services is adverted to as one of the material elements for consideration, the contracts embraced negative stipulations, and this circumstance is reflected in the language of the doctrinal statements of the courts [14]. Such a stipulation is also found in many of the contracts discussed in the more recent cases which have been decided with reference to that factor [15].

But there is nothing in the language or reasoning of the courts to indicate that the propriety of interfering in a given case was to be determined with reference to the inclusion or non-inclusion of a provision of this kind. The conclusion to which this negative evidence as to their views may reasonably be said to point is also supported by several decisions which distinctly embody the motion, that the ultimately differentiating factor is the quality of the services, and not the question, whether the employé has or has not bound himself to abstain from rendering services to a third person [16].

[14] See *Fredericks* v. *Mayer* (1857) 13 How. Pr. 566, aff'd 1 Bosw. 227; *Butler* v. *Galletti* (1861) 21 How. Pr. 465. In the later case Hoffman, J., observed: "I do not think I am bound by the cases to hold, that where there are clear and absolute negative stipulations . . . upon a subject involving in part the exercise of intellectual qualities, and a special case of the impossibility or great difficulty of measuring damages is present, that the jurisdiction to forbid the violation of such covenants does not exist."

[15] See note 6, *supra*.

[16] In *Duff* v. *Russell* (Super. Ct. N.Y. 1891) 28 Jones & S. 80, 14 N.Y. Supp. 134, 39 N.Y.S.R. 266, it was held that, as the defendant, a singer, had agreed to appear in seven performances in each week, (exclusive of Sundays), which the plaintiff company was to give in New York, it was not possible for her to perform elsewhere in New York without a violation of her contract with the plaintiff, and that a negative clause was unnecessary to secure to the plaintiff exclusively the services of the defendant. It was also held that, as it had been arranged between the parties, but without prejudice to the rights of either, that the defendant, upon giving an undertaking to pay a certain sum as liquidated damages in case it should be finally determined that the plaintiff was entitled to an injunction might go on and fulfil her contract at the Casino, the fact that the plaintiff's contract with the defendant had since then expired would not preclude the court from determining the plaintiff's original right to relief by means of an injunction. This decision was affirmed (without any opinion), by the Supreme Court in 16 N.Y. Supp. 958, and by the Court of Appeals in 133 N.Y. 678, 31 N.E. 622, 45 N.Y.S.R. 931.

In *Hoyt* v. *Fuller* (N.Y. Super. Ct. 1892) 19 N.Y. Supp. 962, 47 N.Y. S.R. 504, defendant, an actress and danseuse, performing the "Serpentine Dance," a specialty which she had invented and composed, and as she

asserted could be performed by her alone, agreed with plaintiff to perform for him during "the run" at his theatre, and on the termination of the run to "go on the road," and "for a run in Boston," not exceeding August 1, 1892, the option of terminating the contract being left with plaintiff. *Held*, that the contract, though there was no negative clause in it, gave plaintiff the exclusive right to defendant's service, and that she could not, during her leisure time, perform at other theatres. "The court took the broad ground that equity will not interfere to prevent the violation of such contracts, except where the services are special, unique, and extraordinary.

In *Strobridge Lith. Co.* v. *Crane* (1890) 58 Hun. 611 (memo.) 35 N.Y. S.R. 473, 12 N.Y. Supp. 898, the sole reason assigned for refusing an injunction was, that the services were not special or unique (lithographic sketches).

In *Kessler* v. *Chappelle* (1902) 77 N.Y. Supp. 285, 73 App. Div. 447, the court proceeded upon the ground that, where the services are not of that character, the practical impossibility of determining the damages which will result from a breach of the contract does not of itself constitute a sufficient ground for the interference of equity. The court refused to enjoin the breach of a negative stipulation by a salesman in the employ of agents for a French firm of winemakers, the evidence being that the plaintiffs employed a large number of other persons to perform similar duties.

In the headnote written by the court for *Burney* v. *Ryle* (1893) 91 Ga. 701. it is explicitly laid down that, "unless personal services are individual and peculiar because of their special merit or unique character, a negative covenant (even when express), not to render them to others than the plaintiff, will not be enforced by injunction in order that the plaintiff may have the incidental benefit of an affirmative covenant to serve him exclusively for a specified time."

In *Edwards* v. *Fitzgerald* (N.Y. Sup. Ct. 1895) 9 Nat, Corp. Rep. 455, a dancer of exceptional talent was enjoined from performing for other employers, although her contract did not embrace a negative stipulation. Barrett, J., took the position, that "an agreement to play for a season, or for a tour, with a particular manager imports exclusive service," and consequently an implied negative covenant. In support of this doctrine he cited *Montague* v. *Flockton*, being apparently not aware that this case has been overruled in England. See § 8, *ante*.

C. B. LABATT.

LONG ADDRESSES AT THE BAR IN ROME.

We are apt sometimes to regard the weakness for lengthy addresses at the Bar as an indication of modern deterioration; but if the pages of history are searched, it can be ascertained that, even contemporaneously with the most brilliant forensic orators of Rome, many members of the Bar prided themselves upon the length of their speeches. In the time of Cicero the duration of counsel's speeches was left to the discretion of the judge. Pompey framed a regulation that the accused should be

entitled to engage the Court in criminal matters for a period half as long again as that taken by the accuser. A water-clock was utilized by the Court (clepsydra) for the purpose of measuring time, and if the judge, in the exercise of his discretion, gave a hearing beyond that prescribed he was said dare aquam—to give water.

An amusing instance of "giving water" occurred when Julius Gallicus, a Roman advocate, was pleading before the Emperor Claudius. Having given offence to the Emperor, he was ordered to be thrown into the Tiber; but whether the Imperial irritation was due to undue verbosity or not, history does not, apparently relate. Regulus was a great offender with wearisome orations, and Quintilian tells us that many advocates were proud of their lengthy addresses. Pliny on many occasions spoke at great length. In opening the case at the trial of Marcus Priscus, before the Senate, he spoke for five hours. There are, however, among the profession to-day those who would in point of time have "given him points" on this occasion; but as the worst offenders in this respect are the most intolerant of an identical weakness in others, there are, I think, few who would have been prepared to exercise the patience he displayed when fulfilling the functions of judge himself. "As for myself," said he (Pliny, Ep. vi, 2), "whenever I sit upon the Bench—which in much oftener than I appear at the Bar—I always give the advocates as much water as they require; for I look upon it as the height of presumption to pretend to guess, before a cause is heard, what time it would require, and to set limits to an affair before one is acquainted with its extent, especially as the first and most sacred duty of a judge is patience, which, indeed, is itself a very considerable part of justice. But the advocate will say many things that are useless. Granted. Yet, is it not better to hear too much than not to hear enough? Besides, how can you know that the things are useless till you have heard them? What a model!

—*South African Law Review.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

APPEAL TO KING IN COUNCIL—OMISSION OF APPELLANT TO MOVE FOR NEW TRIAL WITHIN TIME PRESCRIBED BY COLONIAL ACT—CONTRACT—CONSTRUCTION.

Emery Co. v. *Wells* (1906) A.C. 515 was an appeal from the Supreme Court of Honduras in which the Judicial Committee of the Privy Council (Lord Davey and Sir A. Wilson and Sir A. Wills), hold that where the appellant had failed to move for a new trial within the time prescribed by the statute of Honduras the Judicial Committee had no power to relax or dispense with the provisions of such statute. Consequently no grounds were open to the appellant in such a case except whether or not, upon the facts as found, the judgment entered was right. The Judicial Committee also held that where a case turns upon the proper construction of a written document a judge is justified in deciding that himself and not submitting it to a jury.

PRACTICE—APPEAL—TIME FOR APPEALING ALLOWED TO EXPIRE OWING TO MISTAKE OF COUNSEL—LEAVE TO APPEAL—DISCRETION OF COURT.

In re Coles and Ravenshear (1907) 1 K.B. 1. An order had been made by a Divisional Court setting aside an award. At the time the order was made the counsel for the unsuccessful party expressed the opinion that the order was final, and that therefore his client would have three months to appeal; relying on this opinion the solicitor omitted to give notice of appeal until after the lapse of fourteen days, within which time the appeal should have been brought, the order not being made in an action, a fact which had been overlooked, an application was therefore made to extend the time for appealing, but the Court of Appeal (Collins, M.R., and Cozens-Hardy and Farwell, L.JJ.) refused the application, considering themselves bound by the cases of *Re Helsby* (1894) 1 Q.B. 742, and *International Financial Society* v. *Moscow Gas Co.* (1877) 7 Ch. D. 241. We may observe that a more liberal rule prevails in the Ontario Divisional Courts. And in this case the Master of the Rolls said: "If the case were free from authority, and I felt myself at liberty to follow my own judgment in the matter, I should unhesitatingly allow the time to be extended."

LANDLORD AND TENANT—COVENANT TO PAY RENT IN ADVANCE—ANTECEDENT AGREEMENT TO TAKE BILL FOR RENT—CONTRACT—VARIATION OF CONTRACT—EVIDENCE—COLLATERAL AGREEMENT.

In *Henderson* v. *Arthur* (1907) 1 K.B. 10 the plaintiff, a landlord, sued upon a covenant in the lease for the payment of rent, and the defendant set up that by a parol agreement made with the plaintiff before the execution of the lease the plaintiff agreed that he would accept a bill of exchange payable at three months for the rent as it became due. Lord Alverstone, C.J., who tried the case admitted evidence of this agreement and gave judgment for the defendant; but the Court of Appeal (Collins, M.R., and Cozens-Hardy and Farwell, L.JJ.) overruled his decision, and held that the evidence was clearly inadmissible as violating the first principles of the law of evidence, because it would be to substitute the terms of an antecedent parol agreement for the terms of a subsequent formal contract under seal dealing with the same subject matter. That the agreement could not be regarded as an independent collateral agreement because it purported to provide in another, and contradictory manner, what was subsequently provided for in the lease. The Court also holds that a covenant to pay means to pay in cash, unless otherwise expressed.

CRIMINAL OFFENCE—AIDING AND ABETTING—SUMMARY JURISDICTION ACT (1848) 11 & 12 VICT. C. 43), S. 5—AIDER AND ABETTOR CONVICTED AS PRINCIPAL—(CR. CODE, S. 61 (B) (C)).

Du Cros v. *Lambourne* (1907) 1 K.B. 40 was an appeal from a conviction for driving a motor car at an unlawful speed. The evidence was that the appellant owned the car and was sitting in the front seat with a lady, who was driving it, and that it was going at the rate of fifty miles an hour, which was dangerous to the public. The Divisional Court (Lord Alverstone, C.J., and Ridley and Darling, JJ.) held that the conviction was right and that the appellant was aiding and abetting the offence, and as such might properly be convicted as himself doing the unlawful act complained of, and that it was not necessary to charge him expressly with aiding and abetting.

LOTTERY—KEEPING A PLACE FOR A LOTTERY—USE ON ONE OCCASION ONLY—GAMING ACT, 1802 (42 GEO. 3, C. 119) S. 2.

Martin v. *Benjamin* (1907) 1 K.B. 64 was a case stated by a

magistrate. The appellant laid an information against the respondents charging that they did keep a certain place, to wit, the temporary reading room of the Furnishing Trades Exhibition, holden at the Royal Agricultural Hall, for the purpose of exercising therein a lottery. The evidence shewed that the respondents were concerned in carrying on an exhibition in aid of the Furniture Trades Provident and Benevolent Association, and that a ticket was sold by one of them to the appellant, for a lottery which was subsequently held in one of the rooms of the building in which the exhibition was held. The magistrate doubted whether the mere use of the room for a few minutes on one occasion for the purpose of a draw for various articles was keeping an office or place for the purpose of exercising therein a lottery within the meaning of 42 Geo. III. c. 119, s. 2. The question whether the particular transaction was in fact "a lottery" was not argued. The Divisional Court (Ridley and Darling, JJ.) were of the opinion that though possibly an offence might have been committed of selling lottery tickets under 4 Geo. IV. c. 60, s. 41, or of keeping a lottery under 10 & 11 Wm. III. c. 17, s. 2, yet that the use of the room once only did not constitute the offence of keeping an office or place within the 42 Geo. III. c. 119, s. 2, and that the magistrate was right in refusing to convict.

PRACTICE—PAYMENT INTO COURT WITH DENIAL OF LIABILITY—RECOVERY FOR LESS THAN PAID IN—COSTS—PAYMENT OUT OF MONEYS PAID IN BY DEFENDANT, OF AMOUNT RECOVERED.

In *Powell* v. *Vickers* (1907) 1 K.B. 71 the plaintiff sued for unliquidated damages, and the defendants denied liability, but paid into Court £2,500, a reference was ordered with the result that the plaintiff recovered an award for £2,265 8s. 6d., he then applied for judgment, and a master ordered that judgment be entered for the defendants in pursuance of the award, and for their costs of action, reference and award, and for plaintiff for the costs of the issues decided in his favour by the award, and he ordered the money in Court to abide further order. This order was affirmed by Bucknill, J., and the plaintiff appealed, contending that the defendant's right to the general costs of the action, was subject to the right of the plaintiff to the costs of the action up to the payment in of the money; and also that the order should have ordered the amount actually recovered by the plaintiff to be paid out of Court to him, and on both grounds the Court of Appeal (Collins, M.R., and Far-

well, L.J.) allowed the appeal. As to the question of payment out, the Court held that there was a discretion, but primâ facie the plaintiff was entitled to payment out of sufficient to satisfy his claim, and that the onus was on the defendants to give some good reason why that money should remain in Court, and this they had not done.

HIGHWAY—MINE UNDER HIGHWAY—SUBSIDENCE OF HIGHWAY CAUSED BY MINE OWNER—REPAIR OF HIGHWAY—MEASURE OF DAMAGES.

Wednesbury v. *The Lodge Holes Colliery* (1907) 1 K.B. 78 was an action by a municipal authority to recover damages by reason of the defendants having caused a subsidence of a highway vested in the plaintiffs and which they were under a statutory obligation to keep in repair. The subsidence had been caused by the working of a mine beneath the highway. The plaintiffs in repairing the road had restored it to its former level. The defendants contended that the repairs were unnecessarily extensive, and that it would have sufficed at much less expense for plaintiffs to have made the road reasonably commodious for the public; but it appearing that the restoration of the road to its former level had been bonâ fide made, and there being no evidence that the plaintiffs had acted unreasonably the Court of Appeal (Collins, M.R., Cozens-Hardy and Farwell, L.JJ.) held, overruling Jelf, J., that the plaintiffs were not restricted to merely making the road commodious for the public, but were entitled, as against wrongdoers, to restore it to its former condition.

PRACTICE—JOINDER OF CAUSES OF ACTION—ACTION OF TORT—JOINT TORT—ALTERNATIVE CLAIM OF SEPARATE TORTS—COSTS.

Bullock v. *London General Omnibus Co.* (1907) 1 K.B. 246 was an action brought by the plaintiff against two companies. The statement of claim alleged that the plaintiff had suffered personal injuries by the joint negligence of both companies and alternatively that she had suffered such injuries by the separate negligence of each company. In the result the plaintiff recovered judgment against one company and the action was dismissed with costs as against the other. The plaintiff asked that the costs payable by her to the successful defendants should be

added to her own costs and ordered to be paid by the unsuccessful defendant, and Bray, J., who tried the action so ordered, and on appeal the Court of Appeal (Collins, M.R., and Cozens-Hardy and Moulton, L.JJ.), held that the order was right, and after trial it was too late to object that there had been a misjoinder of parties, and that the joinder of the defendants in this case was proper under the Rules as amended after the case of *Smurthwaite* v. *Harmay* (1894), A.C. 494, the Rules as amended including cases of tort as well as of contract.

CHARGING ORDER FOR COSTS ON PROPERTY PRESERVED—SOLICITORS ACT, 1860 (23 & 24 VICT. C. 127) S. 28—ONT. RULE 1129—CHARGE ON SHIP GRANTED EX PARTE.

The Birnam Wood (1907) P. 1 was an action in rem against a ship to recover wages and disbursements, in which the plaintiff was partially successful, and after the release of the ship from arrest, and after its transfer to a limited company, the solicitors of the original owners, who were defendants, applied ex parte, and obtained a charging order for their costs under the Solicitors Act, 1860, s. 28 (Ont. Rule 1129), and, for the enforcement of it, they subsequently obtained, on notice to certain mortgagees of the ship, the appointment of a receiver of freight, and conditionally, an order for sale. Both orders were subsequently set aside on the application of the mortgagees of which application the limited company were notified. The solicitors admitted the orders were properly set aside as against the mortgagees, but appealed so far as they were also set aside as against the owners, the limited company, but on the appeal (Collins, M.R., and Cozens-Hardy and Farwell, L.JJ.) held that the charging order, and subsequent order, were both wrong in substance and in form, because (1) the charging order was granted ex parte; (2) after the vessel had ceased to be under the control of the Court; (3) against the whole vessel whereas the clients had, at best, only a partial interest therein; (4) that knowledge of the solicitors' claim could not be imputed to the company who were therefore bonâ fide purchasers without notice; (5) the jurisdiction to grant charging orders is discretional and the judge had improperly exercised his discretion.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] [Dec. 11, 1906.

HAMILTON BRASS MFG. CO. *v.* BARR CASH & PACKAGE CARRIER CO.

Account—Statute of Limitations—Agents or partners—Reference.

By agreement between them, the Hamilton Brass Mfg. Co. was appointed agent of the Barr Cash Co. for sale and lease of its carriers in Canada at a price named for manufacture, net profits to be equally divided and quarterly returns to be furnished, either party having liberty to annul the contract for non-fulfilment of conditions. The agreement was in force for three years when the Barr Co. sued for an account, alleging failure to make proper returns and payments.

Held, reversing the judgment of the Court of Appeal, Girouard and Davies, JJ., dissenting, that the accounts should be taken for the six years preceding the action only.

On a reference to the master the taking of the accounts was brought down to a time at which defendants claimed that the contract was terminated by notice. The Court of Appeal ordered that they should be taken down to the date of the Master's report.

Held, that this was a matter of practice and procedure as to which the Supreme Court would not entertain an appeal.

Appeal allowed with costs.

Lynch-Staunton, K.C., for appellants. *Gamble* and *Dunn,* for respondents.

N. S.] WOOD *v.* ROCKWELL [Dec. 15, 1906.

Jury trial—Judge's charge—Practical withdrawal of case—Evidence—New trial.

On trial of an action against a surety the defence was that he had been discharged by the plaintiff's dealings with his prin-

cipal. The trial judge directed the jury that the facts proved in no way operated to discharge him; and that while, if they could find any evidence to satisfy them that he was relieved from liability, they could find for defendant he knew of no such evidence and it was not to be found in the case.

Held, that the disputed facts were practically withdrawn from the jury, and as there was evidence proper to be submitted and on which they might reasonably find for defendant there should be a new trial.

Roscoe, K.C., for appellant. *W. B. A. Ritchie,* K.C., for respondent.

Ex.] [Dec. 26, 1906.

ST. JOHN PILOT COMMISSIONERS *v.* CUMBERLAND RY. & COAL CO.

Pilotage—Port of St. John, N.B.—Ships propelled wholly or in part by steam—Coalbarges towed—R.S.C. c. 80, ss. 58, 59.

Coal barges towed by steamers or tugs between the ports of Parsboro, N.S., and St. John, N.B., are exempt from compulsory pilotage at the latter port, even though under favourable conditions they could be navigated as sailing ships.

Judgment appealed from, 37 N.B. Rep. 436, affirmed.

McAlpine, K.C., and *Coster,* K.C., for appellants. *McLean,* K. C., for respondents.

N. S.] [Dec. 26, 1906.

UNION BANK OF HALIFAX *v.* SPINNEY.

Banks—Security of goods—Sale by assignor—Bank's right to proceeds.

C. obtaining advances from a bank to enable him to pay for goods to be used in manufacture, assigned such goods to the bank under s. 74 of the Bank Act, 1890. A cargo having arrived, when the bank notified C. that further advances would be refused, he induced the manager by promise of customer's paper as collateral to give him the sum necessary to pay for it, and immediately after went to S. who had indorsed for him and was liable on a note for $2,800 and gave him a statement of his affairs and agreed to hand him the notes he would receive on selling the

goods, which he did, and S. collected said notes. The bank sued for the amount so collected.

Held, that S. had knowledge, or it would in law be imputed to him, of the bank's claim, and they could recover. Appeal allowed with costs.

Harris, K.C., for appellants. *W. B. A. Ritchie*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [Jan. 21.

MONARCH LIFE ASSURANCE CO. *v.* BROPHY.

Company—Provisional directors—Powers of—Ultra vires.

Appeal from the judgment of ANGLIN, J. By the Act incorporating the plaintiff company certain persons were declared to be provisional directors of the company, who, it was enacted, "may forthwith open stock books, procure subscriptions of stock for the undertaking, make calls on the stock subscribed and receive payments thereon, and shall deposit in a chartered bank in Canada all moneys received on account of stock subscribed or otherwise received by them on account of the company, and may do generally what is necessary to organize the company."

Held, that while it was doubtless within the power of the provisional directors to accept applications for shares and receive payments on account, they had no right to enter into a arrangement or agreement by which, in order to induce a person to subscribe for shares, they were to advance out of the funds of the company to the intending subscriber moneys required to enable him to make payments on the shares; and consequently a contract containing provisions of that nature could not be enforced by the company.

Wilson, K.C., for plaintiffs. *Masten*, for defendant.

Full Court.] STEPHENS *v.* TORONTO RY. CO. [Feb. 5.

Costs—Scale of—Payment of money into Court with defence—Acceptance in satisfaction—Amount within jurisdiction of inferior Court.

Where money is paid into Court by defendant with his de-

fence, and taken out by plaintiff in satisfaction of all the causes of action, the plaintiff is entitled to tax his costs on the scale of the Court in which the action is brought, even where the amount paid in and accepted is within the competence of an inferior Court. Construction of Con. Rules 425, 1132, 1133.

Babcock v. *Standish* (1900) 19 P.R. 195, and *McSheffrey* v. *Lanagan* (1887) 20 L.R. Ir. 528, approved.

Order of a Divisional Court affirmed.

D.L. McCarthy, for defendants, appellants. *Parmenter*, for plaintiff, respondent.

HIGH COURT OF JUSTICE.

Magee, J.—Trial.] CARTER *v.* HUNTER. [Jan. 23.

Tax sale—Invalidity—Lands not in list of lands liable to sale—Vague description—Non-compliance with Act—Lien for purchase money—Lien for subsequent taxes—Interest—Rents and profits—Improvements.

A sale to the defendant on the 10th April, 1901, and a subsequent conveyance of lots 2 and 2 in block B. on the east side of Gladstone Avenue on plan 396, in the City of Toronto, for the arrears of taxes thereon for the years 1893 to 1898, inclusive, were set aside, for the direct breach of sec. 176 of the Assessment Act, R.S.O. 1897, c. 224, the provisions of which are imperative, by selling in April, 1901, without having either in the preceding January, or in January, 1900, which preceded the date of the mayor's warrant, included the two lots in the list of lands liable to sale furnished to the clerk under sec. 152; and also because the description of the lands in the assessment rolls from 1893 to 1898 was too vague and indefinite to be a compliance with the Act; See secs. 13, 29, 34.

The assessments being invalid, the defendant was not entitled to a lien under sec. 218 for the amount of purchase money paid by her, but was entitled to a lien for taxes paid by her for the years 1900 to 1906, inclusive, the assessment for those years being sufficient, and interest thereon, but less the rents and profits derived therefrom, subject to a deduction for repairs, improvements, etc.

Fenton v. *McWain* (1877) 41 U.C.R. 239, and *Wildman* v. *Tait* (1900-1) 32 O.R. 274, 2 O.L.R. 307, followed.

Worrell, K.C., and *Gwynne*, for plaintiff. *St. John* and *Chisholm*, for defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Dec. 22, 1906.

HALIFAX HOTEL CO. *v.* CANADIAN FIRE ENGINE CO.

Principal and agent—Application of O. 47, r. 6—Words "doing business."

Defendant company through the firm of A. Bros., negotiated with the City of Halifax for the sale to the city of a fire engine, and ultimately entered into a contract with the city for that purpose. The business carried on by defendant through the firm of A. Bros. appeared to have been confined to this one transaction, the agent being employed for that purpose alone and so far as the evidence went no further or other business was contemplated.

Held, that this did not constitute "doing business" within the province so as to bring defendant within the provisions of O. 47, r. 6, enabling proceedings to be taken against the company as in case of absent or absconding debtors.

O'Connor and *Terrell*, for appellants. *Mellish*, K.C., for respondent.

Full Court.] [Dec. 22, 1906.

COURTNEY *v.* PROVINCIAL EXHIBITION COMMISSION.

Contract to construct track—Plans and specifications—Deviation—Engineer made sole judge—Authority—Placing stakes—Word "location"—Findings set aside.

M. & S. contracted with defendants for the construction of a half mile track on the Provincial Exhibition Grounds at Halifax under the contract. Under the terms of the contract, of

which certain plans and specifications were made a part, the track was to be located as nearly as possible on the lines shewn on the plan and the exact location was to be staked out by the engineer or his assistant.

Held, that the word "location" referred only to the horizontal location of the track and had no reference to the grading or sub-grades.

It was required by the specifications that the track should be finished to the required grades in every particular and that the decision of the engineer on any matter connected with the grading or lines should be final. Also that no deviation should be allowed from the plans and specifications unless directed by the engineer in writing.

Held, 1. The construction of the track a foot lower than as shewn in the plans was a deviation, and that the placing of stakes by the engineer or his assistant, assuming it to have been done, was not equivalent to written instructions making a change in the terms of the contract.

2. The height and width of the track, grades, etc., being fixed by the plans and specifications and the only duty of the engineer being to see that the contractors built accordingly the finding of the jury that the contractors were misled by stakes placed by the engineer or his assistant was irrelevant.

3. The engineer being the sole judge as to whether the contract was completed to his satisfaction or not, a finding of the jury that it was "practically completed" was irrelevant and must be set aside.

4. It was not an acceptance of the work for defendants to take possession under a provision of the contract enabling them to do so in the event of the contract not being completed within the time specified.

H. Mellish, K.C., for appellants, defendants. *W. B. A. Ritchie,* K.C., and *W. F. O'Connor,* for respondent.

Full Court.] [Dec. 22, 1906.

THOMPSON *v.* CAMERON.

Sale of goods—Implied warranty as to quality—Damages.

A cash register ordered by defendant from plaintiff was found on delivery not to contain a device which defendant had regarded as essential in ordering it and to be defective and un-

reliable in its operation. Defendant wrote a letter to plaintiff's agent the day after the machine was received informing him that the article delivered was not the one ordered and was not in a workable condition and in a letter written some days later he requested the agent to remove the register from his shop and notified him that he would not accept another machine in performance of the contract. The machine was not removed as requested by defendant but remained on the counter of his shop from the time of delivery in December, 1904, until March, 1906, during which time it was in use as a cash box or money drawer but not as a cash register.

Held, that defendant could not use the machine as shewn by the evidence and at the same time claim the right to reject it as not fulfilling the contract, but that as plaintiff's contract was broken he could only recover the actual value of the article sold and that as there was no data for assessing the value of the machine there must be a new trial for that purpose.

W. F. O'Connor, for appellant. *G. H. Parsons*, for respondent.

Full Court.] [Dec. 22, 1906.

OGILVIE *v.* GRANT.

Deed—Description—Agreement for division of land—Ineffective to pass title—Conventional line.

Plaintiff claimed land in dispute under a deed from P.O. of one full half or moiety of the farm lot on which he resided and also one full half or moiety of all the woods, etc., thereunto in anywise belonging or appertaining. The land in dispute was a wood lot situated about two miles from the farm lot and separated from it by the lands of other properties and upon which P.O. was shewn to have got wood and lumber from time to time but as to which there was no general user as part and parcel of the farm, there being another wood lot connected with the farm which was generally used for that purpose.

Held, that in order to pass under the words used the land claimed must be an integral part of the farm itself.

There being ambiguity in this case as to what was included in the words "farm lot" and as to what was appurtenant thereto.

Held, 1. There was no objection to evidence of user to enable the Court to interpret the language used, but that the trial judge

erred in allowing evidence to be given of declarations made by the grantor as to what he meant to convey or thought he had conveyed.

2. Plaintiff having no title to the lot in dispute an agreement made between him and a grantee under P.O. for the division of the lot was ineffective to pass title and the doctrine of conventional agreement for the settlement of questions of disputed boundary had no application.

3. In the absence of evidence of twenty years' continuous and exclusive enjoyment by plaintiff occasional acts of cutting could only be regarded as acts of trespass or, at the highest, as having been done by permission of the owners.

W. B. A. Ritchie, K.C., for appellants. *F. H. Bell* and *R. T. Macilreith,* for respondent.

Longley, J.] [Dec. 24, 1906.

R. *v.* DONOVAN.

Canada Temperance Act—Conviction for violation—Application for habeas corpus refused—Warrant of conviction.

The refusal of the justice before whom a person is convicted of an offence against the Canada Temperance Act to allow inspection of certain documents is not of itself ground for discharge under habeas corpus in the case of a legal conviction and a good warrant. Where in the minute of conviction given to defendant the costs are stated to be $6.00 and in the warrant of commitment the amount is placed at $5.50 (the correct amount) this is not such a variance as would vitiate a legal conviction or justify release under habeas corpus.

Where the papers shewed that on Nov. 21 1906, defendant was convicted of an offence committed on the 25th,

Held, well within the three months' limit fixed by the Act and that it was not essential to shew on the face of the warrant the date of the information.

It was admitted that the warrant of conviction was regular, but it was claimed that the punishment awarded in the conviction (a fine of $50 and costs and in default to be imprisoned for two months), was capable of being read as in the alternative.

Held, under the authority of *The Queen* v. *Van Tassel,* 34 N.S.R. that the warrant was the essential paper and as the con-

viction could be read consistently with the warrant of commitment the application for the prisoner's discharge must be refused.

W. B. A. Ritchie, K.C., for application. *W. F. O'Connor,* contra.

Longley, J.] [Dec. 27, 1906.

SMITH *v.* BOUTILIER.

Trespass by cattle—Failure to maintain lawful fence.

Plaintiff claimed damages for injuries done to her field and garden by defendant's cattle trespassing thereon. Plaintiff's land was situated on a road along which cattle were sent to a common used by the proprietors of other lots as a general pasture lot. The district was not a closed one under the statute and the lands on the road were fenced against cattle. The defendant's cattle entered plaintiff's land through a gate the fastening of which was defective and permitted the gate to open at a slight touch.

Held, that under the facts stated the gate did not fulfil the conditions of a lawful fence and that plaintiff could not recover.

J. L. Barnhill, for plaintiff. *J. B. Kenny,* for defendant.

Longley, J.] [Dec. 27, 1906.

CHISHOLM *v.* CHISHOLM.

Parent and child—Contract for transfer of custody—Illegality.

Plaintiff sought to recover a sum of money from defendant under a contract in writing the basis of which was that plaintiff should consent to defendant being appointed guardian of plaintiff's child. Plaintiff gave the consent required and the appointment was made. Defendant paid the amount agreed for a time and then declined to pay further, whereupon the action was brought.

Held, that the contract being one based solely on the transfer of the custody and care of the child from plaintiff, the mother, to defendant, the guardian, was contrary to law and in the absence of other consideration plaintiff could not recover.

H. B. Stairs, for plaintiff. *Drysdale,* K.C., A.-G., and *H. McInnes,* for defendant.

Townshend, J., Graham, E.J., Longley, J.] [Jan. 26.

FRASER *v.* WATTERS.

Canada Temperance Act—Seizure of liquors—Costs—Judge's discretion.

Defendants under a search warrant against S. under the Canada Temperance Act seized a quantity of liquors which were found in a locked room in the hotel of which S. was proprietor. S. had shortly before been fined under the Act for keeping liquors for sale. There was uncontradicted evidence of both plaintiff and S. that the liquors seized were the property of plaintiff and not of S., having been sold by S. to plaintiff and paid by him partly in cash and partly by an account against S. The trial judge accepted this evidence as true, and gave judgment in plaintiff's favour, but deprived him of costs, assigning as his reason for so doing an inference that the liquors were intended to be used and were used in violation of the Act.

Held, that the circumstances justified him in so doing and that his discretion should not be interfered with.

Per TOWNSHEND, J., dissenting, that the trial judge having felt compelled to accept plaintiff's testimony as true, and having no evidence before him to warrant him in deciding adversely to plaintiff was bound to give him his full legal rights.

J. U. Ross and *J. J. Power,* for plaintiff, appellant. *W. F. O'Connor* and *H. S. McKay,* for defendants, respondents.

Weatherbe, C.J., Townshend, J., Graham, E.J., Meagher, J., Russell, J.] [Jan. 26.

THE KING *v.* LOVETT.

Bank Act—Indictment for making false and deceptive returns—Non-direction.

The defendant as president of the Bank of Yarmouth was indicted and tried for having wilfully made a false and deceptive return to the Government respecting the affairs of the bank. On the trial other returns made both before and after that in respect to which the indictment was laid were received in evidence without the jury having been cautioned that they were not to be influenced by such other returns in coming to a conclusion on the main issue respecting the offence charged.

Held, per TOWNSHEND, J., and GRAHAM, E.J., that there must be a new trial on this ground.

Per WEATHERBE, C.J., and MEAGHER, J., on the facts, that there was no evidence of guilty knowledge and that the case should have been withdrawn from the jury.

Per RUSSELL, J. (who concurred that there was no evidence to warrant a conviction), that there were matters as to which it was open to the jury to draw a conclusion and that the case therefore was one which could not be withdrawn from them.

Attorney-General and *T. R. Robertson*, for Crown. *Pelton*, K.C., and *E. H. Armstrong*, for defendant.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] MOORE *v.* SCOTT. [Dec. 17, 1906.

Promissory note—Holder in due course—Bills of Exchange Act, 1890, *s.* 29—*Rescission of contract—Plea of fraud—Amendment asking for rescission—Restitutio in integrum.*

Plaintiff sued as indorsee of a promissory note which was one of several notes signed by the defendants for the purchase price of a stallion sold to them by the agent of McLaughlin Bros. The note was dated October 27, 1902, and was payable Dec. 1, 1904, "with interest at seven per cent. per annum, payable annually." The plaintiff did not become the holder of the note until October, 1904, and he then knew that the defendants had not paid the interest that fell due in October, 1903.

Held, that plaintiff was not a holder of the note in due course as defined by s. 29 of the Bills of Exchange Act, 1890, as it had been dishonoured by the non-payment of the instalment of interest and plaintiff had notice of that, and that the defences of fraud and misrepresentation on the part of McLaughlin Bros. set up by the defendants were available to them as against the plaintiff in this action. *Jennings* v. *Napanee Co.*, 4 C.L.J. 595, followed.

The trial judge found as a fact that a gross fraud had been perpetrated upon the defendants by McLaughlin Bros. in selling

them for $3,500 a horse thirteen years old under false representation that it was a pedigreed animal only six years old. The horse actually delivered was of little value, had attacks of illness from time to time and finally died in September, 1904. As early as the spring of 1903, defendants had reason to suspect that the horse was an old one and that they had been defrauded; but, according to the finding of fact, they did not know it for certain until after the death of the horse.

Held, 1. Defendants were not too late in exercising their right to rescind the contract, although they took no steps to do so until they set up the plea of fraud in this action. *Morrison* v. *Universal Ins. Co.*, L.R. 8 Ex. 204, followed.

2. Defendants had a right to rescind without restitution in this case, as the horse had died without any default or neglect on their part. *Head* v. *Tattersall*, L.R. 7 Ex. 9, followed.

3. The plea of fraud in this case was defective, as it did not allege that, upon discovering the fraud the defendants rescinded the contract and restored the horse, or—in this case—that, before discovery of the fraud, the horse had died from natural disease without the defendants' fault and that restitution had therefore become impossible, but that the defendants should be allowed to amend their pleading in this respect, as the whole question of rescission and restitution had been fully gone into in the evidence.

Wilson and *J. F. Fisher*, for plaintiff. *Andrews* and *Burbidge*, for defendants.

Macdonald, J.] [Dec. 19, 1906.

PATTON *v.* PIONEER NAVIGATION CO.

Injunction—Riparian proprietor—Extracting sand from bed of river.

Motion to continue an interlocutory injunction restraining the defendants from taking sand out of the bed of the Assiniboine River, opposite plaintiff's property. Plaintiff's affidavits shewed that the removal of the sand was causing a subsidence of the river bank, and if allowed to continue would in no long time cause a large part of the bank to fall into the river to the irreparable damage of the plaintiff's property. Besides denying that the alleged subsidence had been caused by the dredging

operations of the defendants, they filed affidavits to shew the benefit derived by the public from the use of the river sand and the loss to contractors and the public if it could not be procured.

Held, that inconvenience to the public cannot be set up as against private rights and that, as plaintiff had made out a fair primâ facie case, he was entitled to a continuance of the injunction.

Aikins, K.C., and *Blackwood*, for plaintiff. *Hillyard Leech* and *O'Connor*, for defendants.

Macdonald, J.] [Dec. 19, 1906.

WICHER *v.* CANADIAN PACIFIC RY. CO.

Railway company—Lands entered upon by company before expropriation proceedings taken.

The statement of claim alleged that the defendants by their servants, agents and workmen wrongfully and unlawfully entered upon the plaintiff's land and laid down a line of railway over it without any notice to or the permission of the plaintiff. Defendants claimed that, having filed a plan, profile and book of reference as required by the Railway Act, 1903, shewing that the land in question was taken by them for the railway, the plaintiff's remedy was limited to an arbitration to determine the compensation to be paid, and moved to dismiss the action on that ground. Defendants had not served any notice on the plaintiff in pursuance of sec. 54 of the Act, or taken any further steps for expropriation of the land required from the plaintiff.

Held, that defendants were mere trespassers, that the plaintiff was not limited to the remedy provided by the Act, and that the motion should be dismissed with costs.

Elliott, for plaintiff. *Blackwood*, for defendants.

Mathers, J.] FRASER *v.* DOUGLAS. [Dec. 22, 1906.

Guaranty—Offer and acceptance—Right of guarantor to recover from debtor the amount paid to creditor under guaranty.

This was an action to recover money paid by plaintiff upon a guaranty given by him at defendant's request for the price of a quantity of goods ordered by defendant from G. and Co., of Mon-

treal, for whom the plaintiff was western agent. G. and Co. at first refused to fill the order unless the plaintiff would guarantee the account for his ordinary commission. After considerable delay and correspondence G. and Co. wrote plaintiff that they would allow 2½% extra commission for his guarantee, to which plaintiff replied that he would guarantee the account for that season only. G. and Co. then shipped the goods to defendant, but did not notify plaintiff that they had done so until about four months afterwards.

The main defence was that plaintiff was not bound by his guaranty, as he had not received notice of acceptance of it until after the defendant got into financial difficulties, and that, therefore, his payment of the amount was merely voluntary and he could not recover from defendant: *Sleigh* v. *Sleigh*, 5 Ex. 574.

Held, that this case was different from those in which the offer of a guaranty emanated from the gnarantor, and the person to whom it was made acted upon it without notifying the guarantor that he was doing so, for here there was an offer by G. and Co. to fill the order if the plaintiff would guarantee payment and an acceptance of that offer by the plaintiff; that such offer and acceptance constituted a binding contract between G. and Co. and the plaintiff, and no further notice to the plaintiff was necessary, and that plaintiff did not pay as a volunteer, but was legally bound to do so, and was therefore entitled to recover from defendant.

Brandt on Suretyship, para. 213, and *Nelson* v. *Shrene*, 68 S.W.R. 376, followed.

Another objection was that plaintiff was not bound by his guaranty because it was limited to "this season only," whereas a note for the amount was taken from defendant at four months, which would carry the time beyond that season; but this objection was overruled because the evidence shewed that the plaintiff had himself agreed to the terms of the sale which were "four months or 5% off 30 days."

Daly, K.C., and *Crichton*, for plaintiff. *Pitblado*, K.C., and *McKerchar*. for defendant.

Mathers, J.] [Jan. 15.

GRIFFITHS *v.* WINNIPEG ELECTRIC RY. CO.

Jury trial—Action for damages for consequences of negligence—Loss of limb—King's Bench Act, R.S.M. 1902, *c.* 40, *s.* 59.

Application under sec. 59 of the King's Bench Act to have

this action tried by a jury granted in the exercise of judicial discretion for the following reasons: —

1. The plaintiff lost an arm in consequence of being run over by a car of the defendants and a jury would be more likely to assess the proper damages in such case than a judge, if defendants should be found liable.

Woollacott v. *Winnipeg Electric, etc., Co.*, 10 M.R. 482, discussed and distinguished.

2. The principal issues to be tried were issues of fact, viz., whether the car was going at excessive speed, whether the gong was rung and whether the car should have had a fender in front of it or not; plaintiff alleging and defendants denying negligence in all these respects.

Cardinal v. *Cardinal*, 25 Ch. D. at p. 777; *Case* v. *Laird*, 8 M.R. at p. 463, and *Sheppard* v. *Gilmore*, 34 Ch. D. 179, followed.

Manahan, for plaintiff. *Laird*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court] [Dec. 21, 1906.

ESQUIMALT WATER WORKS COMPANY *v.* THE CORPORATION OF THE CITY OF VICTORIA.

Watercourses—Prior rights—English law relating to riparian rights—Introduction of into British Columbia—Appropriation of waters—Authorization of user of water by records or grants—Statutes, construction of.

By s. 9 of the plaintiff company's charter of 1885, they were empowered to survey, set out and ascertain such parts of the land within a prescribed area as they might require for the purposes of their undertaking, to divert and appropriate the waters of Thetis Lake and Deadman's River and its tributaries as they should judge suitable and proper, and to acquire any interests in the said lands or waters, viz.: Thetis Lake and Deadman's River, or any privileges that might be required for the purposes of the company. By s. 10 of the same Act, "The lands, privi-

leges and waters which shall be ascertained, set out, or appropriated by the company for the purposes thereof as aforesaid, shall thereupon and forever after be vested in the company."

By an amending Act of 1892, passed April 23, 1892, the provisions of the principal Act as to appropriation and diversion (but not vesting) were extended so as to embrace Goldstream River and its tributaries, except that there is no vesting clause similar to that contained in said s. 10. It is also provided that the power to divert and appropriate water from this river and its tributaries is to be subject "to any grant of rights, privileges or powers arising under the provisions of the corporation of Victoria Water Works Act, 1873"; and by s. 9, that nothing in the Act is to be construed as in any way limiting or derogating from any grant or privilege accorded to the city under the provisions of the said Act. By s. 10 it is stated that the powers as to Goldstream are conferred only on the condition that the company will supply, on terms which are specified, a maximum quantity of 5,000,000 gallons per diem to the city if so required.

The company in 1892 commenced operations on Goldstream River by clearing the banks, and building dams for the purpose of making reservoirs, and making other improvements. In 1897 the Water Clauses Consolidation Act was passed, by which all unrecorded and appropriated water and water-power, declared by the Water Privileges Act, 1892, to be vested in the Crown, were brought under one comprehensive code for administrative purposes. Between 1892 and 1898 the company had purchased from various owners the lands along the Goldstream River and contended in the action that it had thus become entitled to the riparian rights of such owners.

Held, that the Water Privileges Act, 1892, vested in the Crown the right to the use of all the water in Goldstream River. The company Act of 1892, merely gave it a right to take what was necessary for its purposes, and by taking possession of the source of the river it could not claim the exclusive use of the water from the source of the river to its mouth. The Water Clauses Consolidation Act, 1897, was intended to control the acquisition and use of waters not appropriated on or before June 1, 1897, and prescribed a method by which the right to use such waters, as well recorded as unrecorded, could be obtained. The Act intended that existing companies should be limited strictly to their corporate powers.

The purchase of lands by the company gave it no greater right than the owners possessed, viz.: a right to the uninter-

rupted, undiminished and unpolluted flow of the water past their lands for the purposes incidental to their ownership. The company purchased those lands solely by virtue of the limited authority given it by its Act of incorporation, and for the purposes only of that Act.

Under the provisions of the Water Clauses Consolidation Act, 1897, the city have a right to the waste or unrecorded waters of Goldstream River, and under the Corporation of Victoria Water Works Act, 1873, they have a right to the compulsory acquisition of the whole of the interests of the company on the said river.

Per HUNTER, C.J., dissentiente:—The Legislature, having regard to the nature of the company's undertaking and the conditions it imposed, when it conferred the right "from time to time, and at all times hereafter," to divert and appropriate the waters of Goldstream, granted an exclusive license subject only to the rights conferred on the city by its Act of 1873, and amending Acts; and that the interest or right having sprung into existence, was not intended to be prejudiced by any subsequent legislation.

Per DUFF, J., at the trial:—The enactments dealing with the introduction into the colonies of British Columbia and Vancouver Island, of the general body of English law, clearly do not amount to a declaration of the non-existence of the law regulating riparian rights in those colonies.

Judgment of Duff, J., reversed.

W. J. Taylor, K.C., and *Bodwell*, K.C., for the corporation, appellants.

Luxton, K.C., *Peters*, K.C., and *R. T. Elliott*, for the company.

Martin, Co. J.] [Jan. 9.

BOW MCLACHLAN & CO. *v.* SS. CAMOSOIN.

Admiralty law—Rule 63, scope of to include an equitable set-off —Evidence—Trial, balance of convenience.

In an action in the Exchequer Court of Canada (admiralty jurisdiction), for the price of a ship, where the circumstances entitle the defendant to a reduction of the amount claimed, if such claim can be substantiated, the Court will not exclude the proposed set-off.

Where the ship was built in Scotland, and certain repairs were effected on her way out to the British Columbia coast, the balance of convenience if in favour of trying any disputes concerning those repairs at the place where the ship is, rather than at the place where she was built.

Bond, for plaintiff. *Davis,* K.C., for defendant.

Irving, J.] ATTORNEY-GENERAL *v.* RUFFNER. [Jan. 9.

*Costs—Action by Attorney-General—Payment of costs by relator or Attorney-General—*18 & 19 *Vict. c.* 90, *(Imp.), whether in force in British Columbia.*

In an action by the Attorney-General at the relation of a private individual, the Crown sues as parens patriæ, and the only object of inserting the name of the relator in the proceedings is to make him responsible for costs.

The Act, 18 & 19 Vict. c. 90 (Imperial), is not in force in British Columbia, and the machinery by which the Act is to be marked out could not be applied here.

A. D. Taylor, for Attorney-General. *Bloomfield,* for relator. *Peters,* K.C., and *Belyea,* K.C., for defendant Ruffner. *Bodwell,* K.C., for defendant Blunck.

Full Court.] [Jan. 21.

EMPIRE MANUFACTURING CO. *v.* LEVY.

Discovery—Affidavit—Documents not disclosed in—Further affidavit—Marginal rule 237.

In an action on a guarantee, plaintiffs applied for an affidavit of documents which was filed. This, however, not being considered sufficient, application was made for further information.

Held, affirming the order of FORIN, Co. J., IRVING, J., dissenting, that under marginal rule 237 of the County Court Rules, there is discretionary power in the judge to order further discovery if it is deemed that discovery already made is unsatisfactory or insufficient.

Per MARTIN, J.—The order appealed from is supportable to shew, by the production of the ordinary business books of the

firm, who are really its members by disclosing the manner in which they had dealt with each other.

J. A. Macdonald, K.C., for appellants (defendants). *MacNeill*, K.C., for respondents (plaintiffs).

Full Court.] MACCRIMMON *v.* SMITH. [Jan. 21.

Crown lands patent (Dominion)—Reservation of timber—Mortgage by patentee—Subsequent Order in Council rescinding reservation—Rights of mortgagee in timber—Accretion—Estoppel.

The plaintiff MacCrimmon was the owner and the plaintiffs Pelly the mortgagees of a lot in the district of New Westminster under mortgage dated 5th August, 1893, securing the payment of $1,500. The plaintiff MacCrimmon entered into an agreement with the defendants Johnson and Cook, by which the timber on the land was sold to the latter, who in turn sold to defendant Smith. The plaintiffs' mortgagees claimed to be the owners of the land, and that defendants in cutting and removing the timber under the authority of the agreement with the plaintiff mortgagor, were trespassers; and this action was brought for an injunction and damages in respect of the trespasses. The rights of the parties turned upon the question as to whether the property in the timber had passed to the mortgagees. The mortgagor acquired title under a grant from the Dominion of Canada, issued under the authority of R.S.C. ch. 56, relating to lands in the railway belt in British Columbia. Pursuant to secs. 14 and 15 of the Dominion Land Regulations, ch. 100, of the Consolidated Orders in Council, the grant contained a reservation of all merchantable timber. Subsequently, on 3rd July, 1899, an Order in Council was passed by which the reservation established by these sections was rescinded, and it was provided that all persons who had received, etc., prior to the date of the Order in Council, should be entitled to the timber on their homestead free of duties.

At the trial, DUFF, J., came to the conclusion that by the combined effect of secs. 14 and 15 of the Dominion Land Regulations, and the provisions of the Crown grant under which the lands were held, the property in the merchantable timber on the land comprised in the mortgage deed was reserved to the Crown, subject to

the provisions of those sections, and that, therefore, the rule under which the mortgagee gets the benefit of any accretion to the security did not apply.

Held, on appeal, *per* HUNTER, C.J., and IRVING, J., MARTIN, J., dissenting, reversing the decision of DUFF, J., that there was no estate of any kind reserved out of the land itself, but that the expression "merchantable timber" is to be understood in the sense that a lumberman would understand it, *e.g.*, as not including the roots or stumps which would be left in the ordinary course of logging, and therefore that the reservation was nothing more than a reservation of a profit a prendre in gross, which the Crown could have granted over in fee or for any lesser estate either to the owner of the land or to any other person as it saw fit: that the cancellation of the reserve operated either as a release or a grant of the right in gross to the owner of the land, and that from either point of view when this event happened the owner became possessed of both the land and the profit which issued out of it and therefore the profit became extinct and the timber fell into the inheritance, becoming in law what it had always been in fact, part of the land which had been pledged to the mortgagees: *Herlakunden's Case*, 2 Coke's Reports 443; also Leake's Usage and Profit of Land (1888), p. 359. The reserve mentioned in the Crown grant was merely a license to enter and cut, and not a reservation such as that in *Stanley* v. *White* (1881) 14 East. 343.

Reid, for appellants (plaintiffs). *Macdonell*, for respondents (defendants).

Book Reviews.

We have received the first volume of the new series of the Lawyers' Reports, Annotated, a publication which, from its inherent excellence, is taking a leading place in the literature of case law. This excellence consists in the selection of the cases to be reported and noted, in the treatment of this material and in the convenient and systematic way in which the result is laid before the reader. The L.R.A. seem to have succeeded in blending the good points of reports, digests and text books into one series, so as to make as far as possible an all-comprehensive and convenient library of the law. These volumes are in

fact a library of case law covering a careful selection of judgments delivered in the Courts of the United States with some from England and Canada. But it is the aim of the editors that no case shall be reported that does not give judicial form to some new principle of jurisprudence, or apply an old principle to new conditions, or give a valuable discussion on some important point of law.

Every practitioner will at once see what time and brain fog all this will save him, especially in these days when of reported cases there is no end. And here, by the way, is it not time that some effort should be made by those in authority at the more careful selection of cases so that a much less number should go into print. To the benefits already referred to must be added another most important feature, viz., that the editors aim at the complete exhaustion of all the reported decisions in the countries named which can throw light on the subject under discussion. The lawyer who reads the note knows that further search into the great prairie fields of case law is useless, for he has the whole of the law before him in these pages.

Each volume consists of about 1280 pages, of which nearly one-third is notes. This annotated matter represents editorial work of a very high order of merit, and we doubt if in any other set of annotated reports the editorial work is quite up to the standard maintained in the volume before us.

It may be said that this series of reports approaches gradually to a completely analyzed and indexed library of law; being an encyclopedia of principles practically illustrated by cases. By the system adopted this series does not become obsolete, though, of course, requiring extension, but not revision, except so far as subsequent cases are affected by statutory changes, or by the slower drift of judge-made law.

In conclusion the all-important matter of where to find your law is not forgotten. The systematic digests and indices which are supplied, satisfy all needs in this regard. The publishers of this journal, The Canada Law Book Co., are agents for the publishers of these reports and will give further information regarding them.

It would greatly add to the value of this work in Canada if more attention were paid by the editors in their notes to Canadian leading cases, which are quite as instructive as many of those quoted from the United States reports. It would be well also to have a separate index of English and Canadian cases cited in the notes.

Canada Law Journal.

VOL. XLIII. MARCH 15. NO. 6.

WORKMEN'S COMPENSATION.

A new measure is now before the Legislative Assembly of Ontario which aims at making the liability of employers to compensate their employees for injuries still more onerous.

Under the present law the liability is confined to employers of workmen engaged in manual labour, but not employers of domestic servants. The new bill includes all classes of employers of all kinds of working people. If it should become law, the best thing all small householders who employ domestic servants can do, would be to dismiss them and do their own work. If not, they may find themselves permanently crippled by having to maintain for the rest of her natural life some servant who happens to have sustained a serious injury whilst in their employ.

It may be said that employers can insure themselves against such contingencies, which is true enough, but that means adding so much more to the cost of living, which is already high and is gradually getting higher and higher, especially in the cities of Ontario, and notably so for professional men and those with fixed incomes.

If the Legislature thinks one class of the community should be specially insured against accidents, it should itself assume the burden, for to throw the expense of insuring one particular class of the community upon another class is class legislation of a most indefensible kind. If domestic and farm servants must be insured by their employers against all accidents, why should not every Government officer and clerk be similarly insured by the Government of the province? If servants are entitled to be insured at their employers' expense, why should not butchers and bakers and doctors and lawyers be insured by those who employ them? And as for clergymen it is well known that many of them have less of this world's goods than the women they are occasionally compelled to employ.

Then what a beautiful opportunity for all sorts of frauds on employers is opened up by such legislation. This method of pandering to one class of the community and giving it exceptional rights and privileges which no other class of the community enjoys, will before long work its own cure, in such a revulsion of feeling on the part of the community at large as will make any Government hesitate before it sanctions such a course.

If the Legislative Assembly thinks in its wisdom that workmen should be insured by employers, they should at least also provide that the employer should be at liberty to deduct the cost of such insurances from the wages of those for whose benefit they are effected.

There is neither reason nor justice in extending the principle of workmen's compensation any further than it at present exists, and the Government will, we think, make a great mistake if it lends itself to any such extension as is now proposed. The time has come to make a stand against the insane pandering to the unjust demands of so-called "labour" leaders, who for their own selfish purposes claim and obtain class legislation which disorganizes the social fabric and works injustice, and which in the end is hurtful to those whom they pretend to help.

DO JUDGES LEGISLATE?

Sir Henry Maine inclines to the view that judges do in fact legislate, though by a species of legal fiction they are supposed not to do so. Sir Frederick Pollock, on the other hand, in his able and very lucid note to the second chapter of Maine's History of Ancient Law maintains that they do not. But we are inclined to think, like many differences of opinion, this divergence is due to a want of agreement as to the premises; and the question here to be settled, at the outset is, what is meant by "legislating?"

We do not suppose that Sir Henry Maine intended for a moment to maintain that judges can, or do, exercise all the powers of a sovereign legislator, and yet their want of such

powers is the principal reason that Sir Frederick Pollock assigns in support of his position that they do not legislate, when he says: "A legislator is not bound to conform to the known existing rules or principles of law; statutes may not only amend, but reverse the rule or they may introduce absolutely novel principles and remedies like the Workmen's Compensation Act. Still less, if possible, is he bound to respect previous legislation." If no one could be a legislator who had not all these powers, then Sir F. Pollock might be said to have proved his point, but, as is well known, many bodies as a matter of fact have legislative powers and do legislate within a certain limited area without such powers. A familiar instance is to be found in our municipal corporations and other private and public bodies to whom a limited power of legislation is delegated, and who make laws which, so far as they are within the delegated power, are as binding upon all whom they may concern as though they had emanated from the legislature itself; since the Dominion Parliament itself is not a sovereign legislature, but exercises only delegated powers.

In a similar way judges have by the constitution, impliedly, a delegated power to legislate sub modo. As Sir F. Pollock says: "They are bound to find a decision for every case however novel it may be; and that decision will be authority for like cases in the future; therefore it is part of their duty to lay down new rules if required." But to lay down new rules of law, is, whatever may be said to the contrary, to make a new law; and to make a law is, we conceive, in fact to legislate—notwithstanding that the mode of legislating may be sui generis and not the ordinary way of making laws. And it does not appear to us to be any reason why such new rules made by judges can be said not to be legislation merely because in making such rules the judges have to proceed upon certain well defined principles in laying down such rules. In making by-laws corporations are similarly limited.

But, as we have already intimated, the point necessary to be first settled is "What is meant by a legislator?" If you mean by a legislator, one who makes laws, then sub modo judges make

laws, therefore they are legislators; but if you mean by a legislator one who is endued with sovereign legislative power, then judges have not sovereign legislative power and therefore they are not legislators; but then we might also have to conclude that the Dominion Parliament does not legislate.

The socialistic craze for municipal ownership which of late years has been running its course in England, has been producing all sorts of extravagancies on the part of municipal authorities; with the result that enormous additions have been improvidently made to their debts without any corresponding advantage, money of ratepayers has been expended on all sorts of wild and useless enterprises, and wasted in the most reckless fashion. The long suffering taxpayers who have been thus exploited in the interests of these faddists, are, in London, beginning to squirm, and an immense demonstration recently took place in Trafalgar Square to protest against the methods of the London County Council and to arouse sufficient interest in the community to sweep from the council board those who have been responsible for the wasteful extravagance of the present regime. Since the foregoing was written the electorate has in fact made a pretty clean sweep of those who had abused its confidence; which goes to shew that if the body of the people will be only reasonably vigilant they need not be made the victims of such social parasites. This should be instructive reading for municipal ownership men in the Dominion, for now in England as well as in the United States it has been tried and has proved a failure.

There are many advantages no doubt in popular government, and it is well said that if people who live under it suffer, it is their own fault. But there can be no doubt that in spite of all its advantages, it often proves, as a matter of fact, a very dubious blessing. In the hands of the politician, and the necessity he finds for making himself "solid" with "the masses," it is too

frequently found that it is not the real interests of the community at large that are sought, and it is not the methods of wisdom and righteousness that prevail, but quite the reverse; so that it comes to pass that "popular government" becomes the synonym for all sorts of bad government, and those who really desire the welfare of the community long for "the benevolent despot" who would govern wisely and for the true interests of all.

A recent case in England is as interesting in its way as the Bee Case (ante, vol. 42, p. 723) or the Bull and Heifer Case (ante, infra, p. 66). A cyclist riding on one of the beautiful roads of England ran over a fowl (being a cyclist ourselves we deem him not to have been very skilful) belonging to the defendant, which ingeniously entangled itself in the spokes of his wheel and upset him, causing damage, for which he sued the owner of the biped. It did not appear whether the bird attacked the cyclist or simply after the manner of chickens, children and nervous women, ran across his path; nor was it shewn that this particular offender was in the habit of knocking down cyclists, or that its owner had a knowledge of any malicious propensity in that respect; nor was any evidence given that it was a matter of common knowledge that domestic fowls, presumably the ordinary barnyard variety, were accustomed either to lose their heads (except of course when they "got it in the neck" from the traditional axe) or of being subject to any form of berserker madness. The learned judge of the County Court, under these circumstances, was of the opinion that the defendant was not liable; but this proper pronouncement was coupled with the remark that he only so decided in the present state of knowledge as to chicken nature, and that if other cases occurred and it became well known that they were not the harmless animals they are generally supposed to be he would not feel bound to follow his present ruling. Nothing was said as to the right of domestic fowls to stray on the public highway, or as to any

feature of liability in that regard. At present therefore the warning to cyclists is: Keep out of the way of chickens.

Our legal exchanges discuss the criminal statistics for England and Wales in 1905, recently published. The aggregate of trials for all offences was 791,190, the convictions being 650,567. From this we gather that the millenium has not yet come. There has been an increase in some classes of crime, whilst in others there has been a slight decrease. It would seem that the crimes usually carried out by the habitual criminal, such as burglary and house-breaking, etc., have increased from 1,785 in 1900, to 2,870 in 1905. It also appears that offences against property without violence have steadily increased during the last ten years. Forgery and currency also shew a large increase. On the whole it may be said that though there has been a decrease of crime in 1905, there has been an increase in crimes which might be classed as "the work of the habitual criminal," or those which would come under the head of "educated crime."

The Speech from the Throne referring to legislation in Great Britain has some points of interest in this country. The profession there welcome a proposal to attempt an establishment of a Court of Criminal Appeal, and certainly recent incidents would seem to justify an effort in that direction. We shall wait with some interest any result of this, though it has not yet become a pressing need in this country. Other matters are: the amendment of patent laws; the giving women the right to sit as members of certain municipal bodies; the shortening of hours of labour in mines, etc. The House of Lords also receives attention owing to "the unfortunate differences between the two Houses."

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

PAYMENT INTO COURT WITHOUT DENIAL OF LIABILITY—LIBEL—DEATH OF PLAINTIFF—ABATEMENT OF ACTION—RIGHT TO MONEY PAID AS SATISFACTION.

Maxwell v. *Wolseley* (1907) 1 K.B. 274 was an action of libel in which the defendant paid into Court fifty guineas in satisfaction and pleaded an apology. The plaintiff did not take the money out of Court, and died before trial. The defendant applied for repayment of the money to him and his application was opposed by the executor of the plaintiff who also claimed that the money should be paid to him. The reporter notes that no technical objection was taken to the application of the executor. Bray, J., decided that the executor of the plaintiff was entitled to the money and ordered it to be paid to him, and his order was affirmed by the Court of Appeal (Collins, M.R., and Farwell, L.J.). It would have been interesting as a matter of practice to know what would have been the decision of the Court if the defendant had taken the objection that the executor could not intervene without first reviving the action, and that it was not competent for him to revive and make himself a party because the cause of action was one which did not survive. It might probably have been deemed a good answer to say that quoad the money paid into Court the executor was entitled to revive.

RESTITUTION OF CONJUGAL RIGHTS—SEPARATION DEED—COVENANT NOT TO SUE FOR RESTITUTION—BREACH OF COVENANT FOR MAINTENANCE OF WIFE.

Kennedy v. *Kennedy* (1907) P. 49 was a petition by a wife for restitution of conjugal rights. A deed of separation had been made between the parties which contained a covenant on the part of the husband to pay a third part of his earnings, and a covenant on the wife's part not to sue for restitution of conjugal rights. The husband had broken his covenant, and the question Barnes, P.P.D., was asked to solve was whether the existence of the covenant not to sue on the wife's part was a bar to her application, and he held that it was not and that "the

Court should not allow its hands to be tied by the covenant not to sue in a case, such as the present, where the obligation to pay has been repudiated."

PROBATE—SEVERAL TESTAMENTARY DOCUMENTS—"LAST AND ONLY WILL"—INTENTION.

Simpson v. *Foxon* (1907) P. 54 was a probate suit in which the testator had left several testamentary papers and the question was whether all of these should be admitted to probate. The first was made in 1898 disposing of all his property and appointing his daughter executrix. The second was made in 1903, and was on a printed form commencing, "This is the last and only will of me," whereby he bequeathed the proceeds of an insurance policy and appointed an executor. The third was made in 1905 and described as "a codicil to the last will," whereby he made certain bequests and appointed other executors. The executors named in the last document applied for probate and it was held by Barnes, P.P.D., who tried the case, that all three documents must be admitted to probate and that the words "last and only" in the second did not have the effect of revoking the former will except so far as it was inconsistent with the second one.

RAILWAY COMPANY—OMNIBUS BUSINESS—INCIDENTAL POWERS—ULTRA VIRES.

Attorney-General v. *Mersey Ry. Co.* (1907) 1 Ch. 81 was an action to restrain a railway company from carrying on an omnibus service, as being ultra vires. The railway ran from Liverpool to Birkenhead, and, for the convenience of passengers, the company provided a service of motor omnibuses between their central station at Birkenhead and the residential part of the town. These omnibuses were run to and from their station in connection with their train service, but they picked up passengers and carried them for any distance they pleased on the route, for which fares were charged, Warrington, J., held that as the defendants had no power by their special Acts to run omnibuses their doing so was ultra vires and he granted an injunction (1906) 1 Ch. 811 (noted, ante, vol. 42, p. 561), and the Court of Appeal (Williams, Moulton and Buckley, L.JJ.), held that he was right, but on the defendants undertaking to run the omnibuses to or from the station on their line and in connection

with their trains and not to hold themselves out as doing a general omnibus business and (2) not to charge separate fares for intermediate journeys, and (3) as far as possible to confine their omnibus service to passengers by their trains, the Court discharged the injunction.

COPYRIGHT—LETTER—RIGHT TO PREVENT PUBLICATION OF LETTER —COPYRIGHT ACT, 1842 (5 & 6 VICT. c. 45), s. 3.

In *Macmillan* v. *Dent* (1907) 1 Ch. 107 the Court of Appeal (Williams, Moulton and Buckley, L.JJ.), have affirmed the judgment of Kekewich, J. (1906), 1 Ch. 101 (noted ante, vol. 42, p. 262). It may be remembered that the action concerned the publication of letters of Charles Lamb and the question as to the ownership of the copyright was in question. The owners of the letters had assigned all copyright in them to the plaintiffs, Smith, Elder & Co., in 1895, and that firm had published an edition in 1898 and returned the originals to the owners. The defendant subsequently purchased the originals and took from the legal personal representative of Charles Lamb an assignment of the copyright and of all other his rights therein, but with notice of the prior assignment to Smith, Elder & Co., and was proceeding to republish the letters when the plaintiffs, Macmillan, who had become licensees of Smith, Elder & Co., brought this action to restrain publication by the defendants. Kekewich, J., granted an injunction and the Court of Appeal (Williams, Moulton and Buckley, L.JJ.), affirmed his decision. The material part of s. 3, of the Copyright Act, 1842, is as follows: "Copyright in every book which shall be published after the death of its author shall endure for the term of 42 years from the first publication thereof and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns." The principal difficulty in the case arose from the fact that by the terms of the agreement with Smith, Elder & Co., they were to return the letters after having published them. But the Court of Appeal held that the assignment was in its legal effect an assignment of the right to obtain copyright by first publication notwithstanding the publishers were not to become owners of the letters by means of which the copyright was to be obtained. And as Moulton, L.J., points out if in fact the copyright on publication by Smith, Elder & Co. vested in the owners of the letters, the agreement which they had made was sufficient to transfer it instantaneously it arose

to Smith, Elder & Co. The contention on the part of the defendants, that the personal representative of Charles Lamb was entitled to copyright in the letters was overruled.

TENANT FOR LIFE AND REMAINDERMAN—REAL ESTATE—TRUST FOR CONVERSION—PAYMENTS IN NATURE OF ROYALTIES—CAPITAL OR INCOME.

In re Darnley, Clifton v. *Darnley* (1907) 1 Ch. 159. This was an administration action in which a question arose between tenant for life and remainderman as to whether certain payments received by the trustee of the estate were to be deemed income or capital. The estate was that of a testator who by his will gave his residuary real and personal estate to a trustee upon trust for conversian, and to pay the proceeds to his wife for life and after her death to his children. There was no power to postpone conversion, nor any express gift of the income before conversion. Part of the testator's real estate was under lease which empowered the lessee to dig chalk on certain portion of the demised land, and to take additional chalk land on paying therefor £900 an acre. A sale of the real estate had been directed, but had not taken place. The question was whether moneys thus received or to be received for chalk was to be deemed capital or income and Kekewich, J., decided that it must be treated as income.

LEGACY TO SCHOOL—DISCONTINUANCE OF WEEK-DAY SCHOOL—CONTINUED USER AS SUNDAY SCHOOL—LAPSE.

In re Waring, Hayward v. *Attorney-General* (1907) 1 Ch. 166, a testatrix by her will bequeathed a legacy to "St. Andrew's School, Heybridge," for the benefit thereof. A school of that name had been founded by a brother of the testatrix for the education of the poorer classes. For some years previous to the testatrix's death, but after the date of her will, the use of the school as a week-day school had been discontinued, and at the time of her death it was only used as a Sunday school. The question was whether the legacy had lapsed on the ground that the purpose for which the school had been founded had to a great extent failed. Kekewich, J., held that it had not inasmuch as there had not been a total failure of the institution inasmuch as it still survived in the Sunday school and served the purpose for which it was founded one day in the week.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [Nov. 30, 1906.

SCHWOOB *v.* MICHIGAN CENTRAL RY. CO.

Master and servant—Negligence—Defect in machinery—Defective system of inspection—Workmen's Compensation Act.

On the trial of the action herein, which was against a railway company to recover damages for the death of the deceased through his being called by the escape of steam occasioned by the giving away of a water tube in a locomotive engine on which he was working, the injury, in answer to questions submitted to them, set out in the report, found that the death was caused through a defect in the condition of the locomotive, though the defendants not supplying proper inspection, the defect itself not being specified; but from a discussion which the trial judge had with a jury when they brought in their answers, and from the answers to further questions submitted to them, such defect it appeared consisted in the way the tubes were fixed in the boiler, i.e., in not being, as it was said, properly belled; and that J., who did the work was a person entrusted by the defendants to perform the same.

Held, MEREDITH, J.A., dissenting, that there was no evidence to support a liability at common law, but that it was sufficiently established what the defect was and that such defect would have been discovered had there been a proper inspection and that J. was a person entrusted with the work so that there was a liability under the Workmen's Compensation Act in respect of which the deceased's widow and administratrix could maintain the action and was entitled to recover the damages assessed by the jury under the above Act.

Hellmuth, K.C., and *D. W. Saunders*, for appellants, defendants. *Crothers*, for respondent.

Full Court.] [Jan. 21.

NATIONAL MALLEABLE CASTINGS CO. *v.* SMITH'S FALLS MALLEABLE CASTINGS CO.

Company—Executory contract—Corporate seal—Authority of general manager.

Appeal from judgment of FALCONBRIDGE, C.J.K.B., at the trial. By letter addressed to the plaintiffs signed by the defendants by their general manager the defendants agreed to furnish malleable iron coupler parts to the plaintiffs in certain quantities as might be ordered between certain dates. The letter had at its foot the word "accepted" subscribed with the plaintiffs' name by H. F. Pope, assistant treasurer. The defendants were what is known as a one man company, the president and general manager above referred to, holding 1240 shares out of 1375. No by-law had ever been passed defining the general powers of the board of directors or of the managing director of the above company except as to the power of borrowing money for the purpose of carrying on the business. The managing director did not consult the board before signing the letter referred to and there was no formal subsequent approval by the board of what had been done, nor on the other hand any formal or other dissent. At the time the letter was written the general manager knew that to carry out the proposed contract, an extension of the defendants' plant and premises would be necessary at an additional expenditure of probably $40,000, and the plaintiffs also knew that the full performance of the contract would require a substantial increase of the defendants' plant. But there was no evidence that they knew anything about the defendants' capital or commercial circumstances, or their ability to furnish the additional plant.

Held, 1. In the absence of bad faith or notice the plaintiffs were entitled to assume that the general manager had been clothed with the real authority which he was ostensibly exercising in entering into the contract in question, which was after after all, only one to manufacture and supply articles of the kind for the manufacture and sale of which the defendants were expressly organized, and the agreement therefore, was certainly one to which the board of directors would have had power to bind the company by entering into it.

2. The circumstance that the contract required for its full

or maximum performance an increased plant was not in itself sufficient to render the whole ultra vires; it would have been otherwise if such increased plant had been required to carry on a new or different business from that then being carried on by the defendant company. As it was, the supplying such additional plant would fall under the head of "management" and would therefore be within the general scope of the defendants' authority.

3. There was no need here of the corporate seal although the contract was an executory contract; and the plaintiffs were entitled to recover so far as they had given orders for the couplers under the contract.

W. Cassels, K.C., and *W. D. McPherson*, K.C., for the defendants, appellants. *J. H. Moss* and *C. A. Moss*, for plaintiffs.

Full Court.] [Jan. 28.

HANLY *v.* MICHIGAN CENTRAL RY. CO.

Railway—Injury at highway crossing—Negligence—Findings of jury—Train "behind time."

In an action to recover damages for the death of a man who was struck by a train of the defendants at a highway crossing, the evidence as to whether the statutory signals were given was conflicting, and, while it was shewn that the train was about ten minutes late, there was no evidence as to the cause of the delay, nor was it shewn that the deceased was misled thereby. The jury found that the defendants were guilty of negligence, which consisted in the train being "behind time"; but they did not answer a question put to them as to whether the bell was ringing.

Held, that no actionable negligence was shewn or found, and the action should be dismissed; it was not a case for a new trial.

Sec. 215 of the Dominion Railway Act, 1903, did not aid the plaintiffs.

Judgment of BOYD, C., reversed.

Hellmuth, K.C., and *Cattanach*, for defendants, appellants. *S. White* and *E. Meek*, for plaintiffs.

HIGH COURT OF JUSTICE.

Divisional Court.] [Dec. 4, 1906.

CLARKE *v.* UNION STOCK UNDERWRITING CO.

Bills of exchange and promissory notes—Absence of consideration—Evidence, admissibility of—New trial.

In an action upon two promissory notes for $3,000 and $4,000 respectively, the defendants set up that the defendants had never received any value for the notes, and that the plaintiff was not a bona fide holder for value. At the trial the defendants tendered evidence, which was refused, to shew that the notes were given merely as receipts for stock which had been delivered to the defendants for sale as agents, that there was no consideration for the notes, and that the plaintiff was merely a clerk in the office of his solicitor, and had given no value therefor; also that a written agreement for the transfer of the stock made between the payee of the stock and another one of the defendants' firm had never been acted upon, or had been abandoned.

Held, that whether or not evidence was admissible to shew that the notes were given as receipts, the defendants were entitled to give in evidence all the facts which would tend to establish want of consideration, and this, having been denied them, a new trial was directed.

Watson, K.C., and *Medd*, for plaintiff. *Rose*, for defendants.

Meredith, C.J.C.P.] [Dec. 4, 1906.

MONTGOMERY *v.* RYAN.

Venue—Trial in Toronto—Investigation of accounts — Proper case for trial without a jury—Striking out jury notice.

The practice where the venue in an action is laid out of Toronto is, except in rare cases, to leave the matter to be dealt with by the trial judge; but in Toronto, where there are separate sittings for jury and non-jury cases, the latter being practically a continuous sitting throughout the year, the practice has been adopted, in order to prevent the jury list from being unduly encumbered, to strike out the jury notice in cases which properly ought to be tried without a jury.

Where, therefore, in an action on a promissory note, which involved an investigation of accounts, and was therefore properly triable without a jury, an order was made in chambers directing such notice to be struck out.

W. N. Ferguson, for plaintiff. *W. M. Hall*, for defendant.

Meredith, C.J.C.P.] RE GAMBLE [Dec. 8, 1906.

Will—Devise to two devisees—Death of one before testator—Lands and personalty—Tenants in common—Joint tenants—Survivorship.

A testator, by his will, amongst other devises, devised certain land to two sisters naming them, to whom he also gave his residuary estate. One of the sisters predeceased the testator.

Held, that as regards lands the sisters would take as tenants in common, and therefore as to the deceased sister's share therein there would be a lapse, but as to the personalty they would take as joint tenants, and the surviving sister took the whole by survivorship.

H. Morrison, Malcolmson and *Harcourt*, for various parties.

Boyd, C.] RE CRICHTON. [Dec. 15, 1906.

Medical practitioner—Infamous and disgraceful conduct in a professional sense—Erasing name from register—Advertising secret remedy—Deceitful and fraudulent advertising—Mistrial—Appeal to Divisional Court.

The charge laid under s. 33 of the Ontario Medical Act, R. S.O. 1897, c. 176, against a medical practitioner, was, that he was guilty of "infamous and disgraceful conduct in a professional respect," in advertising a secret remedy, called "Grippura," which the advertisement claimed would cure grippe or influenza, and would assist in curing a number of other diseases, while the finding against him was, that he was guilty of deceitful and fraudulent advertising, for which his name was ordered to be struck off the register.

Held, on appeal to a Divisional Court, under s. 36 of the Act,

that the order could not be supported, and must be set aside; and his name, if struck off, restored to the register.

What constitutes "infamous or disgraceful conduct in a professional respect," considered and commented on, as well as the evidence submitted with reference thereto, and the course pursued by the prosecution on the hearing of the charge.

W. F. Kerr, for appellant. *Curry*, K.C., for Discipline Committee. *H. S. Osler*, K.C., for Medical Council.

[Dec. 15, 1906.

Falconbridge, C.J.K.B., Britton, J., Clute, J.]

BURTCH *v.* CANADIAN PACIFIC RY. CO.

Railways—Crossing in town—Hand-car—Warning—Finding of jury—Railway committee jurisdiction—Infant plaintiff—Contributory negligence—By-law—Invoking for another purpose.

A child of ten years of age was coasting down an incline on a street in a town crossed by a railway and was run down and injured by a hand-car proceeding along the railway. At the trial the jury found in answer to questions amongst other answers that the defendants were negligent in not giving some warning in approaching the crossing; that the defendants could have avoided injuring the plaintiff by stopping the hand-car and that it was their duty apart from the provisions of the Railway Act to have given warning.

Held, 1. The jury in finding that the railway should have given such warning were not assuming to lay down any general rule as to what care or precaution should be taken, but simply that under the circumstances some warning should be given, that the answer was unobjectionable and in no way infringed upon the jurisdiction of the Railway Commission.

2. Even if a hand-car is not a train a warning was necessary apart from the Railway Act.

3. Although there was a municipal by-law to prohibit coasting, the plaintiff had not been "warned," which was necessary under its provisions to make coasting an offence and the onus is on the defendants to prove criminal capacity at common law and under the Code of an infant under fourteen, and the defendants were not entitled to invoke such by-law for another purpose.

4. Although a defendant is not liable if the injury is caused entirely by an infant's own negligence, the capacity of the infant to be guilty of contributory negligence is a question for the jury, and that as the plaintiff was not a trespasser and was where he was as of right and had not been "warned" under the provisions of the by-law, or his capacity for crime shewn, the trial judge was right in submitting the whole case to the jury, and the jury having found in favour of the plaintiff the verdict should not be disturbed.

H. S. Osler, K.C., for the appeal. *W. J. L. McKay,* contra.

Mulock, C.J. Ex.D., Teetzel, J., Anglin, J.] [Jan. 17.

CANADIAN OIL FIELDS CO. *v.* VILLAGE OF OIL SPRINGS.

Assessment—Mining lands—Value as agricultural lands—Buildings—Plant—Illegal assessment—Jurisdiction.

An assessor assessed mining lands at their value as agricultural lands under sub-s. 3 of s. 36 of the Assessment Act of 1904, but further assessed the buildings and mining plant as such and adding the two latter together entered them as the assessed value of the buildings.

Held, that that method was an attempt to evade the fair meaning of the Act; that the assessment of the exempted property, the plant, was illegal and it was not for the assessor in the exercise of his judgment to assess it for taxation at any amount and the illegality being established, the Court had jurisdiction to deal with the matter outside of the machinery provided by the Assessment Act for dealing with such a complaint.

Judgment of BOYD, C., reversed.

A. Weir, for the appeal. *Towers,* contra.

Mulock, C.J. Ex.D., Teetzel, J., Anglin, J.] [Jan. 25.

RE PORTER.

Restraint on alienation—Will—Devise—"During lifetime"—"Mortgage or sell."

A testator by his will devised land to his "son H. P. his heirs and assigns to have and to hold to said H. P. his heirs and

assigns for his and their sole and only use forever subject to the condition that the said H. P. shall not during his lifetime either mortgage or sell (the land) thus devised to him."

Held, that the restraint on alienation being limited was good.

Judgment of BRITTON, J., affirmed.

J. H. Spence, for the applicant. *Harcourt,* official guardian, for infants.

Divisional Court.] [Feb. 11.

LIVINGSTON *v.* LIVINGSTON.

Reference—Solicitor—Master—Acceptance by Master of retainer from one of the parties—Setting aside reference.

Appeal from ANGLIN, J., on motion by plaintiffs to set aside the reference to the Master at Berlin and all proceedings thereupon had before him on the ground that the firm of solicitors in which the said Master is a partner had accepted a retainer from the defendant pending the reference for some non-contentious business in the Surrogate Court of the County of Waterloo, by which judgment the learned judge set aside the reference and proceedings accordingly.

Held, that the judgment appealed from must be affirmed. Without suggesting that there had been or would be any bias, the Master as the solicitor even in a small matter for the defendant, who is a man of large business interest, might reasonably be suspected of bias.

S. H. Blake, K.C., and *J. H. Moss,* for defendant, appellant. *J. W. Nesbitt,* K.C., and *Britton Osler,* for respondent.

Cartwright, Master.] BOYD *v.* MARCHMENT. [Feb. 12.

Production—Discovery—Accident—"Recklessly and negligently" driving.

In an action for injuries to the plaintiff and his carriage, caused by the defendant's servants driving "recklessly and negligently" on an examination of the defendant for discovery he gave the names of his men who were with his waggon at the time of the accident but could not give the weight of the load without

his books which he declined to produce. After the examination was adjourned for the purpose of a motion to compel their production, his solicitors wrote a letter (*without prejudice) that the defendant's team was coming from a house in a certain street and that the weight of the load and waggon together was not less than three tons. This the plaintiff declined to accept as official.

Held, that as the plaintiff's case rested on "recklessly and negligently driving horses and a conveyance," which the defendant contended was impossible on account of the weight of the load, and as it might assist the plaintiff to find out what house the team was coming from and the weight of the load the books must be produced.

J. D. Montgomery, for the motion. *J. E. Jones,* contra.

*Waived on the argument.—Rep.

Cartwright, Master.] [Feb. 12.

BURNS *v.* TORONTO RAILWAY CO.

Discovery—Medical examination—Time when to be ordered.

An examination under Con. Rule 462 is an examination for discovery and that rule must be applied the same as Con. Rule 442: and an order for the medical examination of a plaintiff in an action where the liability is disputed will not be made if opposed before the delivery of the statement of defence where opposed.

Frank McCarthy, for the motion. *H. C. Macdonald,* contra.

Falconbridge, C.J.K.B.] RE HART ESTATE. [Feb. 14.

Devolution of Estates Act—Administrator only adult interested in real estate—Registration of caution.

An intestate owning real estate died leaving her surviving her husband and two infant children. Letters of administration were issued to the husband who registered a caution under sub-s. 5, s. 14, of the Devolution of Estates Act, R.S.O., 1897, c. 127,

and with the consent of the official guardian sold the real estate. On an application under Con. Rule 972,

Held, that he, being the only adult interested in the real estate although he was administrator, had the right so to do.

W. A. Baird, for applicant. *Harcourt*, official guardian, for infants.

Divisional Court.] [Feb. 18.

McCORMICK *v.* TORONTO RAILWAY CO.

Damages—Assignment of claim for—Chose in action—Assignability of—O. J. A. c. 58, *sub-s.* 5.

The plaintiff brought this action for personal injuries sustained by his being run down by a car of the defendant company, and for the killing of his master's horse which he was riding, in respect of which latter he claimed under assignment from his master. Anglin, J., at the trial entered judgment for the plaintiff for the damages found by the jury in respect to the personal injury, but dismissed the action as to the claim for damages to the horse, upon the ground that such a claim was not an assignable chose in action.

Held, that the judgment must be affirmed and the appeal dismissed with costs.

Godfrey and *Phelan*, for plaintiff. *H. S. Osler*, K.C., for defendants.

Province of Nova Scotia.

SUPREME COURT.

Longley, J.] ADAMS *v.* ADAMS. [Jan. 2.

Trustee—Breach of trust—Damages.

Plaintiff conveyed a property owned by him to defendant to secure the payment of certain amounts owing by him to defendant and took from defendant an acknowledgment in writing that the property was to be retransferred to plaintiff or his heirs on payment of the full amount due to defendant at the

time the retransfer was asked for. Plaintiff failed to record the declaration of trust and defendant gave a deed of the property to a third party.

Held, that in the absence of evidence to justify a finding that the third party knew of the trust a reconveyance could not be decreed but that plaintiff was entitled to recover damages for the breach of trust, and also for the value of articles left upon the property by plaintiff and sold by defendant and not accounted for.

W. B. A. Ritchie, K.C., and *T. R. Robertson,* for plaintiff. *A. Drysdale,* K.C. (A. G.), and *H. McInnes,* for defendant.

Russell, J.] TOWNSEND *v.* COLEMAN. [Jan. 2.

Canada Temperance Act—Action to recover money paid to constable—Remedy by injunction—O. 50 *r.* 1*—Costs.*

In an action for money had and received plaintiff sought to recover a sum of money paid by plaintiff to defendant, a constable, to secure plaintiff's release from imprisonment under a warrant of commitment for a violation of the Canada Temperance Act.

Held, 1. Dissolving with costs the interim injunction obtained by plaintiff to restrain the paying over of the money by defendant on the ground that the warrant was illegal, that it is against the policy of the law in relation to injunctions to interfere by that procedure in a case where the only thing at stake is the right to recover a small sum of money.

2. R. 1 of O. 50, if applicable to the case of an implied or quasi contract, such as the plaintiff was proceeding upon, required a prima facie case of liability on the part of the defendant to be made out, while in the present case the prima facies were the other way, the Court having decided that the warrant of commitment was made by a competent magistrate. The fact that defendant was indemnified was not a sufficient reason for refusing costs.

W. E. Roscoe, K.C., for motion. *J. J. Power,* contra.

Longley, J.] SMITH *v.* WAMBOLD. [Jan. 7.

Husband and wife—Deed by husband to wife—Claim by wife to surplus proceeds as against subsequent creditors.

In the year 1894 defendant conveyed certain real estate to his wife by a deed which was duly recorded. In 1906 defendant got into financial difficulties and a mortgage on the property was foreclosed, the amount realized at the sale being larger than the amount due on the mortgage. The surplus proceeds were claimed by defendant's wife under the deed to her as against judgment creditors and assignees of her husband.

The evidence shewing that at the time the deed was made and for ten years or more afterwards defendant was perfectly solvent,

Held, that the deed made by defendant to his wife was effective and that she was entitled to the surplus proceeds as against the other claimants.

Whitman and *R. H. Murray,* for judgment creditors and assignees. *Tobin,* for grantee under deed.

Full Court.] THE KING *v.* MACK. [Jan. 7.

Municipal council—Disqualified person continuing to sit—Remedy by quo warranto—Presumption.

Defendant rented and resided in a house in the town of L. for which he paid rent as a yearly tenant. He also, by arrangement with his father who resided with him, paid the taxes rated and assessed in respect to the house, but it appeared that the house was rated and assessed in the name of the father and not in the name of defendant.

Held, 1. Defendant was not a "ratepayer" within R.S.N.S. (1900) c. 71, s. 26 (2) and was not qualified to be elected or to sit as a councillor for the town.

2. It appearing that defendant was not a ratepayer at the time of his election the disqualification must be presumed to continue to exist, and defendant having continued to sit and act as a councillor an information in the nature of a quo warranto was the proper remedy to test his right to do so, the proceeding not being one to question the election or return but to

try the right of defendant to hold an office in which the statute said he should not serve.

H. Mellish, K.C., for informant. *J. J. Ritchie*, K.C., for defendant.

Full Court.] [Jan. 7.

THE KING *v.* DOMINION COAL CO.

Mines Regulation Act—Payment of employee otherwise than in money — Company store — Penalty — Enforcement under Summary Convictions Act—Amendment of statute—Appeal.

Under R.S.N.S. (1900) c. 19, s. 27, the wages or salary of any employee of any coal mine shall not be paid otherwise than in money current in the Dominion of Canada and owners who contravene or fail to comply are held to be guilty of an offence against the chapter and liable to a penalty of not less than $50 or more than $100. The informant who was a miner in the employ of defendant company, and his father with whom he lived, contracted debts at the company's store, and by an arrangement which had been running for some time, a portion of the informant's wages was deducted and credited on the accounts and the balance paid to him in cash.

Held, 1. The company was within the provision respecting the penalty and was liable.

2. TOWNSHEND, J., dubitante, that the matter was one in respect to which there was an appeal from the judge of the County Court to this Court.

3. The fact that the form of conviction in the Summary Convictions Act contains a clause providing for imprisonment in default of distress, which would be inapplicable to corporations, does not displace the remedy under that Act.

The judge of the County Court made a fresh conviction in which he directed that the penalty should be paid out of money deposited by defendant to the informant as the "person aggrieved." These words had been struck out of the statute before the information was laid and as the law stood at that time it did not give the penalty to the person aggrieved.

Held, that the case must be remitted to the County Court to have the order amended in this respect.

Covert and *Robertson*, for appellant. *J. McK. Cameron* and *W. F. O'Connor*, for respondent.

Longley, J.] McNeil *v.* O'Connor. [Jan. 9.

Mortgage—Action on covenant to recover balance after foreclosure—Costs.

A sale by foreclosure of premises mortgaged by defendant to plaintiff failed to realize the amount of the mortgage with interest and costs. Plaintiff thereupon brought an action on the covenant in the mortgage to recover the balance due.

Held, that plaintiff was entitled to judgment for the balance claimed, but as he could have included the claim on the covenant in the former action, when seeking foreclosure of the mortgage the judgment must be without costs.

H. A. Lovett and *James Terrell,* for plaintiff. *H. Mellish,* K.C. for defendant.

Longley, J.] Lownds *v.* Clay. [Jan. 9.

Bills and notes—Action by indorser against maker.

A promissory note made by defendant in favour of L. was indorsed by L. and after having been indorsed by plaintiff at the request of L. was discounted at the bank.

Defendant having failed to pay the note when due, plaintiff was called upon to do so, and paid the amount and then brought action against defendant for the amount. On application for judgment under O. 14 it was claimed on behalf of defendant that the note was made for the accommodation of L. and that plaintiff was aware of this when he indorsed it, and that the note being overdue when plaintiff became the holder of it defendant could raise as against him any defence that he might have had against the original payee.

Held, that this did not constitute a defence as against plaintiff and that he having paid the note was entitled to recover against defendant as maker.

J. B. Lyons, for plaintiff. *W. F. O'Connor,* for defendant.

Meagher, J.] Donnelly *v.* Vroom. [Jan. 9.

Crown grant—Mud flats flowed by tide—Rights of owner held subject to right of public to enter and dig clams.

Defendants were the owners under a grant from the Crown to their predecessors in title, more than seventy years ago, of

land bounded on one side by Digby Basin together with the flats in front of the granted land down to low water mark. The grant also purported to convey the right of fishery. The flats, at low water, were left entirely bare for a distance of some hundreds of feet from the shore, and at full tide were covered by a sufficient depth of water to float small vessels. The only use to which they were put by the owners was the erection of weirs for taking fish, and the occasional digging of clams in small quantities. Plaintiff landed on the flats at low water without permission and proceeded to dig for and remove clams. Defendants ordered plaintiff to desist and, on his refusal to do so, took possession of the clams dug and also of plaintiff's boat and oars. To an action by plaintiff claiming damages for conversion defendants counterclaimed damages for breaking and entering defendants' close, digging up the soil, etc.

Held, that the public right of navigation and fishery could not be affected or diminished by any transfer of an arm of the sea or its shores to an individual. That plaintiff as one of the public had the right to go on the flats and dig for and take away clams, and if, in the exercise of that right, to which defendants' rights, as owners of the soil, were subject, he dug up the soil for the purpose of securing clams he did only what he was lawfully entitled to do, and he was not liable in trespass for entering the flats nor in trover for carrying away the clams so obtained.

F. Jones and *W. E. Roscoe,* for plaintiff. *J. J. Ritchie,* K.C., for defendants.

Full Court.] McINTOSH *v.* CAMPBELL. [Jan. 10.

Witnesses and evidence—Commission to take evidence out of province—Judge's discretion.

The judge of the County Court granted an order appointing a special examiner to take the evidence of plaintiff and other witnesses at Rossland, B.C., it appearing that the plaintiff and the witnesses whom it was desired to have examined resided there, that the amount involved was only $126.72 and that it would be much cheaper to have the evidence taken under commission than for the witnesses to attend personally at Sydney, C.B., where the trial was to be had.

Held, that the order was reasonable and proper and that the judge's discretion in granting it should not be interfered with.

W. F. O'Connor, for appellant. *H. Mellish,* K.C., for respondent.

Weatherbe, C.J.] REX *v.* HOARE. [Jan. 11.

Canada Temperance Act—Third offence—Proof of date of previous information.

Defendant was convicted before the stipendiary magistrate of the Town of Stellarton for a third offence against the second part of the Canada Temperance Act, and was sentenced to imprisonment for the term of three months.

The previous convictions made against him were proved as permitted by the statute by the certificates of the convicting justices, but the dates of the informations on which these convictions were based were proved only by a statement in the certificates and by the oral testimony of the prosecuting solicitor.

Held, that this was not legal proof and that the prisoner was entitled to his discharge.

Held, also, folowing *Reg.* v. *The Troop,* 29 S.C.R. 662, that the objection was one going to the jurisdiction.

J. J. Power, for the prisoner. *W. B. A. Ritchie,* K.C., and *W. McDonald,* for prosecutor and stipendiary magistrate.

Weatherbe, C.J., Townshend, J., Graham, E.J., Meagher, J., and Russell, J.] [Jan. 12.

ST. CHARLES *v.* ANDREA.

Garnishment—Money deposited in bank by husband to credit of wife—Not attachable—Remedy under Married Woman's Property Act.

Money deposited by a husband in a bank in the name of his wife, in fraud of his creditors, cannot be recovered by the husband as against the wife and therefore is not a debt due from the wife to the husband and cannot be attached as such by the husband's creditor.

But, under the provisions of the Married Woman's Property Act, R.S. (1900) c. 112, s. 12, moneys so deposited or invested may be followed by creditors as they might be before the Act.

W. A. Henry, for appellant. *H. Mellish,* K.C., for respondent.

Weatherbe, C.J., Townshend, J., Graham, E.J., Meagher, J., and Russell, J.] [Jan. 12.

THE KING *v.* MCKENZIE.

Customs—Conviction for violation—Excessive term of imprisonment—Power of Court to reduce—Code, ss. 883, 879—*Words "hear and determine."*

A conviction made by two justices of the peace whereby defendant was convicted of a violation of s. 197 of the Customs Act of Canada, as amended by the Customs Amendment Act of 1888, s. 14, s. 38, imposed a penalty of $50 for the offence and $18.20 costs, and in default of payment imprisonment for six months. No term of imprisonment was specified in the special section referred to and the term in such case, under the general provision in the Code was three months.

The conviction having been removed into the Supreme Court by certiorari.

Held, 1. The Court in such case has the like powers as the County Court, viz., (1) To hear and determine the charge upon the merits; (2) To reverse or modify the decision; (3) To make such other conviction as the Court thinks just.

2. The Court having the depositions before it and being satisfied from their perusal that the offence had been committed, had power under the Code (ss. 883, 879) to amend the conviction by reducing the term of imprisonment from six months to three and that as so amended the conviction should stand and the motion to set the same aside be dismissed, but without costs.

3. There is nothing in the expression "hear and determine" which limits the investigation to be made by the Court to the hearing of oral evidence, the words being the expressions most commonly used to express the act of the Court in disposing of cases upon evidence already taken.

J. J. Ritchie, K.C., for appellant. *W. F. O'Connor,* for respondent.

Weatherbe, C.J., Townshend, J., Graham, E.J., and Russell, J.] [Jan. 24.

LOTT *v.* SYDNEY AND GLACE BAY RY. CO.

Street railroad—Injury to child—Liability of company—Failure to provide fender.

Plaintiff an infant under the age of two years was run down and injured by an electric or tram car on the defendant company's road causing the loss of a leg. The evidence shewed that the child was seen approaching the track in time to have enabled the motorman to stop the car and avert the accident, but instead of doing so he came to the conclusion that the child was about to go back and increased the speed of the car so that it was impossible for him to stop in time, thus causing the accident.

Held, 1. There was a clear case of negligence for which defendant was responsible in damages.

2. Where an electric or tram car is operated without having attached thereto proper, necessary and efficient fenders as required by law, such absence is evidence of negligence.

TOWNSHEND, J., dissented.

W. B. A. Ritchie, K.C., and *T. R. Robertson*, in support of appeal. *H. Mellish*, K.C., contra.

Graham, E.J.] BRAYLEY *v.* NELSON. [Jan. 24.

Building contract—Defective workmanship—Damages.

Plaintiff contracted to build two cottages for defendant for the sum of $150 each defendant finding the materials. The cottages were to be built like another cottage and it was stipulated that they should not leak. Defendant paid $200 on account and there was a balance of $104, including a small amount for an extra not in dispute, due at the time of action brought. The cottages were found to be defectively constructed and to leak badly, particularly around the windows. Plaintiff sued for the balance of the contract price and the extra, and defendant counterclaimed damages for the defective construction.

The evidence shewing that the leak complained of was due to defective work and not to defective materials.

Held, that defendant was entitled to recover on his counterclaim with costs for the defective construction, and that plaintiff

should have judgment with costs for the balance in his favour, the costs to be set off.

C. R. Smith, K.C., for plaintiff. *T. S. Rogers* and *S. Jenks*, for defendant.

Graham, E.J.] MATHESON *v.* REID. [Jan. 24

Constable—Arrest — Justification under warrant — Abandonment of levy—Estoppel—Costs.

Defendant, a constable, levied under a warrant upon a number of articles in satisfaction of a sectional school rate due by plaintiff, but subsequently returned the articles taken upon demand by plaintiff's solicitors claiming that they were unlawfully taken, and giving notice of action for a return of the property taken and for damages in default of their immediate delivery. Defendant afterwards made affidavit that he was unable to find goods sufficient to satisfy the warrant and a justice of the peace, thereupon, under R.S. 1900, c. 73, s. 83, issued a warrant against plaintiff authorizing defendant to levy upon the goods and chattels of plaintiff for the amount due and in default of goods to take the body. Defendant made a further demand and failing to obtain goods arrested plaintiff and conveyed him to jail. Plaintiff brought an action for assault and imprisonment, but just before the trial amended by adding paragraphs claiming damages for trespass in connection with the taking of the goods levied upon and returned, and for other alleged acts of trespass, etc.

Held, 1. So far as the arrest and imprisonment were concerned defendant was protected by the warrant.

2. The levy made having been abandoned and the goods restored, there was not such a satisfaction of the claim as would prevent the subsequent issue of and the arrest under the individual warrant.

But *semble*, that plaintiff having demanded and received back the goods as unlawfully taken would be estopped from saying that a levy had been made which barred a subsequent levy and arrest.

Held, that defendant having returned the goods on the assumption that they were unlawfully taken was liable in damages for the taking and detention (assessed at $1), but as he was entitled up to the time of the amendment to have the action dis-

missed he was entitled to costs of all issues found in his favour as against the one issue found against him.

T. S. Rogers, and *A. G. McKenzie,* for plaintiff. *J. L. Ralston,* for defendant.

Weatherbe, C.J., Townshend, J., Graham, E.J., Meagher, J., Russell, J.] [Jan. 26.

REX *v.* MCGILLIVRAY.

Canada Temperance Act—Arrest on Sunday—Taking bail and fixing day.

M. was arrested on Sunday on a warrant issued for an offence against the Canada Temperance Act. When brought before the magistrate he applied to be admitted to bail and was permitted to make a deposit in lieu of bail and the case was set down for hearing on a week day and M. was discharged from custody. M. appeared at the time appointed and secured a further adjournment upon his agreeing to leave the amount of the deposit as bail for his appearance. On the day last mentioned he appeared and objected to the legality of his arrest on Sunday and to the action of the magistrate in taking bail and fixing a day.

Held, 1. Sec. 564, sub-s. 3 of the Code was made applicable to the case by the Canada Temperance Act, s. 107, and that the warrant could be executed on Sunday.

2. Per GRAHAM, E.J., MEAGHER, J., and RUSSELL, J., assuming that the releasing on bail and fixing a day for the hearing were illegal, that the arrest being legal there was a negligent escape and nothing to prevent the defendant from being retaken, and that the magistrate had jurisdiction to proceed with the case.

3. For such a defect as that contended for in the procedure prohibition was not the proper remedy.

Per TOWNSHEND, J.:—The taking of bail and fixing a day was not illegal, but an act done in connection with the arrest.

WEATHERBE, C.J., dissented.

J. J. Power, in support of application. *W. F. O'Connor,* contra.

Full Court.] WARD *v.* MCKAY. [Jan. 26.

Will—Construction—Words, "my first family," "survivors."

Testator by his last will devised the remainder of his property to A., a son by a second marriage, with a proviso that if A. died in the lifetime of his mother the latter should have the use of the property during her lifetime, and that on her death it should be equally divided among "my first family or the survivors of them." A. died in the lifetime of his mother, at the age of fourteen, and all the children of the first marriage died after A. and before the period of distribution, arrived all, with two exceptions, without leaving issue. One of the children, who had married, disposed of her share, by will, in favour of her husband.

Held, 1. The children of the testator alone could take under the words "my first family," and that the word "survivors" meant the survivors of those children and did not cover descendants.

2. On the death of A. the remainder vested in the children of the first family subject to being divested in favour of the survivors at the period of distribution. But, there being no survivors at that time, and nothing to divest it, it remained the property of the representatives of the children.

3. Expressions in the will explaining the reasons why testator made no other provision for the children of the first family were not intended to and did not exclude them from the right to participate in the remainder on the death of A. in the lifetime of his mother and the death of the life tenant.

J. U. Ross, for appellant. *W. B. A. Ritchie,* K.C., for respondent.

Weatherbe, C.J., Townshend, J., Graham, E.J., and Meagher, J.] [Jan. 26.

IN RE CAMERON.

Magistrate's Court—Writ for service out of country—Requirement as to payment and indorsation of fees—Waiver.

Under the provisions of R.S.N.S. (1900) c. 160, s. 5, when the defendant does not reside in the county in which the writ of summons is issued the plaintiff shall before such writ is issued deposit with the justice issuing the same a sum equal to ten

cents per mile of the distance between the residence of the defendant and the place of trial, and by sub-s. 2, "the amount of such deposit shall be indorsed on the writ of summons and copy and if the same is not actually paid and indorsed such writ and the service thereof shall be void."

Held, per WEATHERBE, C.J., and TOWNSHEND, J., that the provision of the statute was imperative and could not be waived.

Per GRAHAM, E.J., MEAGHER, J., concurring, that notwithstanding the language of the statute the requirement was waived by the filing of a paper in the nature of a defence.

J. J. Power, and *R. G. McKay*, for appellant. *Gregory*, K.C., and *E. L. Gerroir*, for respondent.

Before Townshend, J., Graham, E.J., Russell, J., Longley, J.] [Jan. 26.

SMITH *v.* THOMAS.

Landlord and tenant—Parol lease, rent commencing at future day—Statute of Frauds, R.S. (1900) *c.* 141, *s.* 3.

On Nov. 11, 1905, defendant agreed to take plaintiff's house for a year from Nov. 15, at the rental of $360 payable monthly.

The evidence shewed that after some negotiations defendant asked "if he rented the house when the rent would commence," to which plaintiff replied that "it would commence on Nov. 15, rent payable from that date." Defendant thereupon said "he would take the house."

Held, that the contract was one within the exception in s. 3 of the Statute of Frauds, R.S.N.S. (1900), c. 141, and could be enforced notwithstanding the absence of a note or memorandum in writing or an entry into possession.

Jenks, for defendant, appellant. *W. B. A. Ritchie*, K.C., for plaintiff.

[Jan. 26.

Townshend, J., Graham, E.J., Russell, J., Longley, J.]

SMITH *v.* ARCHIBALD.

Sales—Warranty—Trial — Misdirection — Verdict set aside—Costs.

Action for the price of trees sold defence that the trees were sold subject to a warranty and that part of them were not

according to warranty. Motion for a new trial on the ground of misdirection.

Held, that where a judge undertakes to put the evidence before the jury he is not at liberty to present in a strong light all the facts and circumstances that make for the contention of one of the parties, and entirely, or practically, ignore the evidence that makes for his opponent. A charge constructed on such lines is tainted with misdirection and the verdict resultant therefrom will not stand unless the case is so clear that a verdict for the other party, on the evidence before the Court, would be set aside as one that no reasonable jury could give.

W. E. Roscoe, K.C., for appellant. *J. J. Ritchie,* K.C., and *S. Jenks,* for respondent.

Weatherbe, C.J.] [Jan. 30.

AMERICAN HOTEL & SUPPLY CO. *v.* FAIRBANKS.

Foreign company—Failure to comply with Act requiring registration—Exclusion from carrying on business.

Under the provisions of R.S.N.S. (1900) c. 127, s. 18, as amended by Acts of 1904, c. 24, every company not incorporated by or under authority of an Act of the legislature of Nova Scotia, which carries on business in Nova Scotia, is required to "before beginning busines in the province make out and transmit to the provincial secretary a statement under oath shewing, etc."

In an action brought by plaintiff against defendant claiming damages for breach of a contract in writing, whereby defendant undertook, during the period over which the contract extended, to make use in his hotel of an "advertising inkstand cabinet" supplied by the plaintiff, it appeared that plaintiff was a foreign company, incorporated under the laws of Illinois, in the United States of America, and had not complied with the requirements of the statute of this province in relation to registration.

Held, that in the absence of the statement under oath required by the statute, the language of the Act was prohibitory and that the business carried on by plaintiff was within the mischief contemplated and that defendant was entitled to judgment with costs.

W. B. A. Ritchie, K.C., and *T. R. Robertson,* for plaintiff. *H. Mellish,* K.C., for defendant.

Graham, E.J.] THOMPSON *v.* THOMPSON. [Feb. 11.

Building not attached to land—Sale with consent of owner—License coupled with an interest—Consideration.

Defendant gave permission to his son M. to erect a small building upon land of which defendant was in the occupation, agreeing that the building, which was not intended for any permanent purpose in connection with the land should remain personal property and be removable at the owner's pleasure.

Plaintiff, with the assent of defendant, purchased the building from M., defendant agreeing that it could be taken off later.

Held, that defendant could not afterwards claim that the building was a fixture; and that the license given to plaintiff, when he purchased and paid for the building was a license coupled with an interest, which could not be revoked. But, if otherwise, there being a consideration plaintiff could recover damages for breach of the promise.

J. L. Ralston, for plaintiff. *T. S. Rogers,* for defendants.

Graham, E.J.] ROGER *v.* MINUDIE COAL CO. [Feb. 13.

Railway Act, R.S. (1900) *c.* 99, *s.* 219—*Excessive tolls—By-law not approved—Pleading—Counterclaim.*

In an action brought by plaintiff as liquidator of the Canada Coal and Railway Co. against the defendant, for moneys paid on defendant's account to the Intercolonial Railway for cars used at the defendant's mine, a balance was found in favour of plaintiff, against which defendant sought to have set off a claim for excessive charges alleged to have been made by plaintiff for the carriage of defendant's coal. By the Railway Act, R.S. (1900) c. 99, s. 219 (formerly Acts of 1898, c. 4, s. 19), it was provided that no tolls should be levied or taken until the by-law fixing such tolls had been approved by the Governor-in-Council, etc. It appeared that the plaintiff company acquired their line from a former company, known as the "Joggins Railway Co.," and that the Governor-in-Council had, in 1887, approved a by-law of that company fixing the toll for transportation of coal at 28c. per ton, and that after the road passed into the hands of the plaintiff a by-law was passed fixing the rate at 40c. per ton and

was forwarded to the Governor-in-Council for approval, but no action was taken upon it and it was never approved.

Held, that in the absence of such approval the charge made was illegal, and that defendant, having paid the difference between the two rates under protest, was entitled to offset the amount so paid against plaintiff's claim, but that, in the absence of a counterclaim, defendant could not have judgment for any excess.

J. L. Ralston, for plaintiff. *W. T. Pipes*, K.C., for defendant.

Province of Manitoba.

KING'S BENCH.

Phippen, J.A.] [Dec. 21, 1906.

SLINGSBURY MANUFACTURING CO. *v.* GELLER.

Partnership—Limited partnership.

The defendant Rosenthal bought an interest in a partnership business carried on by his co-defendants Geller and Haid under the name Winnipeg Shirt and Overall Manufacturing Company, contributed the sum of four thousand dollars to the funds of the partnership and the three undertook to form a limited partnership under R.S.M. 1902, c. 129. They then drew up and signed a certificate in the form set out in s. 66, using the same firm name. This certificate was filed in the office of the prothonotary, who recorded it in the book provided for that purpose pursuant to s. 68, but it was not recorded at large as required by that section. Section 69 says that no such limited partnership shall be deemed to have been formed "until a certificate has been . . . . recorded as above directed," and the plaintiffs sought judgment against Rosenthal upon a promissary note and an acceptance of the firm on the ground that he was liable as a general partner, the limited partnership contemplated not having been effectively formed, also because the firm name chosen did not contain the names of either of the general partners, as required by s. 72.

Held, 1. That "recorded at large" means entered at length, and therefore the limited partnership had not been formed.

2. It was a good objection to the formation of the limited partnership that none of the names of the general partners were used in the style of the firm.

3. As the statute does not expressly impose upon a special partner the liability of a general partner for either of the found defects, but does impose such liability if any false statement is made in the certificate, or if the style of the firm contains the name of such special partner, the defendant Rosenthal was not made liable by the statute as a general partner.

4. There was nothing to shew that Rosenthal had made himself liable as a general partner of the firm by contract, express or implied, or by holding himself out as a partner, or by any subsequent conduct consistent only with the existence of an actual partnership with his co-defendants.

Patterson v. *Holland*, 7 Gr. 1, distinguished, owing to the differences between the respective statutes.

The date of the certificate filed was Feb. 14th, whilst the evidence shewed that it had not been signed until the 17th, when it was recorded.

Held, that this was not such a false statement in the certificate as to render Rosenthal liable, under s. 69, as a general partner.

Cameron and *Phillipps*, for plaintiffs. *Bradshaw* and *A. M. S. Ross*, for defendant.

Mathers, J.] [Dec. 22, 1906.

IN RE MILLER AND THE TOWN OF VIRDEN.

Municipal by-law—Ultra vires—Restraint of trade—R.S.M. 1902, *c.* 116, *ss.* 368, 632(*i*), 654(*f*)—*Weighing of coal on public scales.*

Application to quash a by-law of the town requiring that all coal sold in the town for delivery therein should be weighed on the public weigh scales established under the authority of the by-law, and that a certificate of the true weight of all coal delivered signed by the public weigh master should be handed to the purchaser at the time of delivery. The objections to the by-law

were, (1) that it was ultra vires, (2) that it was in restraint of trade, and (3) that it tended to establish a monopoly in the weighing of coal.

Held, that the council had power to pass the by-law under the authority of sub-s. (*i*) of s. 632 and sub-s. (*f*) of s. 654 of "The Municipal Act," R.S.M. 1902, c. 116, the language of the latter sub-section being "(*f*) For regulating the mode of measuring or weighing . . . cordwood, coal or other fuel and for imposing a reasonable fee therefor, and for regulating the sale of said articles," and that the by-law was not open to any of the objections urged against it. Dillon, s. 390, Cooley, p. 286, Tiedman, par. 127, and *Stokes* v. *New York,* 14 Wend. 87, followed.

Sec. 368 of the Municipal Act cannot be construed as prohibiting such a by-law.

Agnew, K.C., for applicant. *I. Campbell,* K.C., for Town of Virden.

Macdonald, J.] RE CODVILLE. [Jan. 11.

Conveyance of land—Reservation of claim for compensation.

Held, that the owner of property which will be depreciated in value by the contemplated closing of a street may sell and convey the property in fee simple reserving the right to collect afterwards from the municipality the amount of damage to the property that will accrue when the street is actually closed. Under such circumstances it is no answer to his claim for such damages that he has ceased to have any estate or interest in the land.

Wilson, for claimant. *Aikins,* K.C., for C.P.R. *I. Campbell,* K.C., and *Hunt,* for City of Winnipeg.

Province of British Columbia.

SUPREME COURT.

Full Court.] [Jan. 21.

STAR MINING AND MILLING CO. *v.* BYRON N. WHITE CO.

Practice—Appeal—Security for costs.

Defendants applied under s. 114 of the Companies Act for the costs of the action which had been decided in their favour, and also for the costs of the appeal from that decision. The judgment appealed from was given in February, 1905; in March, 1905, defendants were aware of the plaintiffs' inability to pay the costs of the action unless an appeal resulted in their favour. Taxation took place June 27, 1906, and the application for security was made July 30, 1906.

Held, on appeal, that the application was made too late, plaintiffs having in the meantime perfected all necessary steps for taking an appeal.

Held, as to the costs of the appeal, that 110 of the Supreme Court Act, which limits the security that may be required for costs of appeal to $200, governed.

Decision of HUNTER, C.J., affirmed.

Bodwell, K.C., and *Lennie*, for appellants. *Davis*, K.C., and *S. S. Taylor*, K.C., for respondents.

Full Court.] DE BECK *v.* CANADA PERMANENT. [Jan. 21.

Mortgagee—Power of sale—Orders nisi and absolute—Accounts —Rents, receipt of—Tender—Interest.

A mortgagee having obtained a foreclosure order nisi, shortly afterwards, and before the period allowed for making absolute the order nisi had expired, entered into an agreement for the sale of the mortgaged premises to a purchaser who had knowledge of the foreclosure proceedings. The order absolute was never taken out. The agreement for sale was not dsposited for

registration for some three years after it was entered into, but a few months before its deposit for registration, a tender was made on behalf of plaintiffs if the amount due under the mortgage, which was refused on the ground that the property had been parted with and that the plaintiffs had lost their right to redeem.

Held, affirming the decision of HUNTER, C.J., that the mortgagee could not, after the order nisi for foreclosure, and before it was made absolute, exercise his power of sale without the leave of the Court. *Stevens* v. *Theatres, Limited* (1903) 1 Ch. 857; and *Campbell* v. *Holyland* (1877) 7 Ch. D. 166 followed.

Davis, K.C., and *Cayley*, for plaintiffs. *Bodwell*, K.C., and *Shaw*, for defendants.

Full Court.] IN RE LONSDALE ESTATE. [Jan. 21.

Statute, construction of—Land Registry Act—Mandamus.

There was submitted to the municipal council of North Vancouver a plan shewing a sub-division of a portion of a lot in pursuance of s. 68 of the Land Registry Act. The plan shewed a portion of the lot abutting on the waterfront, left not sub-divided, the strip so remaining averaging some 400 feet long the end of the lot between First Street and the waterfront. The reeve declined to certify the plan on the ground that under s. 68 of the Land Registry Act the streets should be shewn extending down to the water. On application to IRVING, J., a writ of mandamus was issued directing the reeve to certify the plan in compliance with s. 68. From this the municipal council appealed.

Sec. 68 provides that in case a lot borders on the shores of any navigable water, the streets leading to and continuing to such water must be shewn at a not greater distance apart than 600 feet.

Held, that the object of the section was to require land abutting on navigable waters to be sub-divided so as to provide straight and continuous access to the water at intervals of not less than 600 feet.

Per MARTIN, J.:—The section does not apply unless the streets which lead towards the water reach it.

A. D. Taylor, for appellant. *Davis*, K.C., for respondent.

Full Court.] [Jan. 30.

MCGREGOR *v.* CANADIAN CONSOLIDATED MINES.

Statute, construction of—Penal statute—Inspection—"Machinery hereinafter mentioned," meaning of.

Rule 21a of s. 25 of the inspection of Metalliferous Mines Act, as enacted by s. 12 of c. 37 of 1902, provides that "every person . . . . employed in or about a metalliferous mine in which the machinery hereinafter mentioned shall be operated for more than twenty hours in any twenty-four, (1) operates any direct acting, geared or indirect-acting hoisting machine exceeding fifty horse-power, or (2) operates any stationary engine or electric motor exceeding fifty horse-power, and shall perform any such duties for more than eight hours in any twenty-four shall be guilty of an offence under this Act."

Held, that the phrase "machinery hereinafter mentioned" must be read distributively; or as meaning "any of" the machinery hereinafter mentioned.

Held, that the words "preceding section" in Rule 21b, refer to the preceding rule.

Decision of DUFF, J., affirmed.

A. H. MacNeill, K.C., for appellants. *Maclean,* K.C. (D.A. G.), for the Provincial Government.

Errata are things which will occur in the best of regulated publications. Sometimes the original scribe is to blame; sometimes an over-wise proof reader, sometimes an unwise printer. Perhaps most of the readers of the article on page 42 may have noticed that in two places the word "injury" was inserted in place of "inquiry," to say nothing of the curious Latin on page 43, also that on page 82 on the twenty-first line the word "ascertaining" should read "enabling." We trust our readers will make due allowances for a long suffering editor.

Injury to a passenger by a dog on a street car is held, in *Westcott* v. *Seattle, R. & S.R. Co.* (Wash.), 4 L.R.A. (N.S.) 947, to make the carrier liable.

A contract made on Sunday, the formalities of completing which are not finished until another day, is held, in *Jacobson* v. *Bentzler* (Wis.), 4 L.R.A. (N.S.) 1151, to be illegal.

Canada Law Journal.

VOL. XLIII. APRIL 1. NO. 7.

THE LAW OF BILLS AND NOTES.

FICTITIOUS OR NON-EXISTING PAYEE.

The two recent English cases of *Vinden* v. *Hughes* (1905) 1 K.B. 795, and *Macbeth* v. *North & South Wales Bank* (1906) 2 K.B. 718, raise the interesting question whether the named payee of a bill of exchange or promissory note or cheque, although he is a real person and intended by the drawer to be the payee, may nevertheless be "a fictitious or non-existing person" within the Bills of Exchange Act, if there is no real transaction with the payee upon which the bill might be based and which would justify the payee in endorsing the bill. The cases referred to answer the question in the negative, and invite a comparison with the case of *London Life Ins. Co.* v. *Molsons Bank* (1904) 8 O.L.R. 238, in which the contrary conclusion appears to have been reached.

The Bills of Exchange Act provides that "where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." This provision is also applicable to notes and cheques and is contained in sub-s. 5 of s. 21 of the Act as revised in 1906 (R.S.C., c. 119), and in s. 7 both of the English Bills of Exchange Act, 1882, and of the Canadian Bills of Exchange Act, 1890.

PREVIOUS LAW:—

Before referring to the cases in which the statutory provision has been considered, it is desirable to state with precision what was the law upon the subject before the statute, and for this purpose one cannot do better than quote the words of Lord Justice Bowen in *Vagliano* v. *Bank of England* (1889) 23 Q.B.D. 243, beginning at page 257:—

"The law merchant seems to have been clear, and to have

been based throughout on the principle of the law of estoppel, which in its turn is conformable with reason and business principles. An acceptance after sight of a bill is an admission by the acceptor of the genuineness of the signature of the drawer, an admission, that is to say, that the signature is either in his handwriting or placed to the draft by somebody who has authority to sign for him, and the acceptance is also a representation by the acceptor in favour of all bona fide holders that, so far as he knows, the payee exists and is a person of a capacity to indorse: *Drayton* v. *Dale* (1823) 2 B. & C. 293, and *Mead* v. *Young* (1790) 4 T.R. 28.

"The genuineness of the indorsement of the payee was, however, a matter as to which, except in one special instance, no estoppel prevailed. The one exception to the rule was the case described as follows in Story on Bills of Exchange, ss. 56, 200. Sec. 56: "A bill made payable to a fictitious person or his order and indorsed in the name of such fictitious payee in favour of a bona fide holder without notice of the fiction, will be deemed payable to the bearer and may be declared on as such against all the parties who knew the fictitious character of the transaction." Sec. 200. "If the bill is payable to a fictitious person or order (as has been sometimes, although rarely, done), then, as against all the persons who are parties thereto and aware of the fiction (as, for example, against the drawer, indorser or acceptor), it will be deemed a bill payable to the bearer in favour of a bona fide holder without notice of the fiction." This exceptional rule in the case of fictitious bills is based as has been stated, on a special application to a particular case of the principle of estoppel, which plays so important a part in the law merchant. Its history, so far as English law books are concerned, dates back to a century ago, and is set out in a note to *Bennett* v. *Farnell* (1807) 1 Camp. 130, at p. 180. In the first case which bears on the subject—*Tatlock* v. *Harris* (1789) 3 T.R. 174—at the time the bill was drawn there was no such person in existence as the payee, a fact which was notorious to all the parties in the transaction and particularly to the acceptor. It was

suggested by the Court in argument that if a bill were made payable to the Pump at Aldgate or order it might be recovered on as in effect a bill to bearer. And in *Vere* v. *Lewis* (1789) 3 T.R. 182 a case decided upon the same day, the Court intimated an opinion that a similar bill, drawn and accepted under similar circumstances to those in *Tatlock* v. *Harris*, might be so treated. In *Gibson* v. *Minet* (1791) 1 H.Bl. 569 the same point was distinctly raised, subject to this qualification that the indorsement by the fictitious payee was there made before acceptance and was itself known not to be genuine by the acceptor at the time of such acceptance. The Queen's Bench held that the bill was in effect payable to bearer, and the decision was confirmed by the House of Lords. A perusal of the opinions of the judges in that case shews that they considered the exception in the case of such fictitious bills to be in reality nothing but a further application of the doctrine of estoppel in a case in which knowledge of the fiction by the acceptor gave rise to an estoppel of the kind.

In *Gibson* v. *Hunter* (1794) 2 H.B.l. 187, 288 the House of Lords appears to have expressly decided that it was only where the fictitious character of the bill was known to the acceptor at the time of acceptance that the bill could be treated against the acceptor as a bill payable to bearer. The question arose on a demurrer to evidence, and it is to be observed that the fourth count alleged merely that the supposed payee was fictitious without alleging that the acceptor knew of this. It was proved in evidence that no such person as the payee existed, and that the name of the payee indorsed on the instrument was not in the handwriting of any person of that name, but on the evidence it was still left in doubt whether the acceptor was privy to the fact of the payee being fictitious. The judges advised the House, and the House of Lords decided in conformity with their advice, that upon this record no judgment could be given, and a venire de novo was awarded. If the knowledge of the acceptor had been immaterial, judgment ought to have been given on the record on the fourth count. The case, how-

ever, went down again to be tried and again came before the House of Lords on a demurrer to evidence, and it was finally held that in an action on a bill of this sort against the acceptor to shew that he was aware that the payee was fictitious, evidence was admissible of the circumstances under which he had paid other bills to fictitious persons. Not only, therefore, is the first case of *Gibson* v. *Hunter*, an authority to the effect that the exceptional doctrine under discussion only applies where the acceptor knows that the payee of the bill which he is accepting is fictitious, but the whole of the subsequent litigation becomes unintelligible upon any other hypothesis.

In *Bennett* v. *Farnell* (1807) 1 Camp. 130, 180c. a bill of exchange made payable to a fictitious person was sued upon as a bill to bearer, but there was no evidence that the acceptor knew of the fiction. Lord Ellenborough nonsuited the plaintiff. In Lord Campbell's head-note to the case the effect of the decision is thus stated: 'A bill of exchange made payable to a fictitious person or his order is neither in effect payable to the order of the drawer nor to bearer.' But at page 180c of the addenda, there is this further note by Lord Campbell: 'In *Bennett* v. *Farnell*, the doctrine supposed to have been held that "a bill of exchange made payable to a fictitious person, or his order, is neither in effect payable to the order of the drawer nor to bearer" must be taken with this qualification—unless it can be shewn that the circumstance of the payee being a fictitious person was known to the acceptor. A new trial was refused in this case, because no such evidence had been offered at nisi prius. Lord Ellenborough said he conceived himself bound by *Gibson* v. *Minet* (1791) 1 H.Bl. 569 and the other cases on this subject which had been carried to the House of Lords (though by no means disposed to give them any extension), and that if it had appeared that the defendant knew George Abney, the payee, to be a fictitious person he should have directed the jury to find for the plaintiff.'

The above authorities relate to the case of fictitious persons. In *Asphitel* v. *Bryan* (1863) 5 B. & S. 723 a similar question

occurred where a bill by arrangement between the acceptor and the drawer was drawn and indorsed in the name of a dead man. A similar application was there made of the same principle of estoppel. Probably it was with reference to this case that the term 'non-existing' is introduced into the sub-section which we have to interpret. Down, therefore, to the date of the passing of the recent statute the exception that bills drawn to the order of a fictitious or non-existing payee might be treated as payable to bearer was based uniformly upon the law of estoppel, and applied only against the parties who at the time they became liable on the bill were cognizant of the fictitious character or of the non-existence of the supposed payee.

The principle that lies at the root of the exception is that a reasonable effect must be given in favour of bona fide holders to the act of acceptance, and that, where it appears that although there was a named payee he was so completely fictitious or non-existing that the acceptor could not have intended to restrict payment to such payee or to his order, the acceptor, who must be taken to have intended that his acceptance should have some commercial validity, was estopped from saying that the bill was not a bill payable to bearer.

CONSTRUCTION OF THE STATUTE:—

Such was the law upon the subject prior to the statute. The statute provides that "where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." In the case from which Lord Justice Bowen's judgment has been quoted above, *Vagliano* v. *Bank of England* (1889) 23 Q.B.D. 243 the Court of Appeal read the statute as not extending the previous law, and held therefore that a bill might be treated as payable to bearer only as against a person who knew, when he took it, that the payee was a fictitious or non-existing person.

It was held, however, by the House of Lords in *Bank of England* v. *Vagliano* (1891) A.C. 107, that such a qualification of the express words of the statute could not be properly implied

from the earlier cases. If the payee is fictitious or non-existing, the bill may, as regards all persons, be treated as payable to bearer. It was held further that the word "fictitious" is applicable not only to a creature of the imagination having no real existence, but also to a real person named as payee who has not, and never was intended by the drawer to have, any right upon or arising out of the bill. The section applies, although the bill (so called) is not in reality a bill, but is in fact a document in the form of a bill manufactured by a person who forges the signature of the named drawer, obtains by fraud the signature of the acceptor, forges the signature of the named payee, and presents the documents for payment, both the named drawer and the named payee being entirely ignorant of the circumstances: ib.

SUMMARY OF LEADING CASES:—

At this point it may be convenient to give a summary of the facts of the *Vagliano Case* and of the other leading cases decided under the Act:

1. A bill purporting to be drawn by A. to the order of C. & Co., and to be endorsed by them, is accepted by the drawee payable at his bankers'. The bankers pay it at maturity. A. is a correspondent of the acceptor's, who often draws bills in favour of C. & Co. It turns out afterwards that the names and signatures of the drawer and payees were forged by the acceptor's clerk, who obtained the money. Under these circumstances C. & Co., are fictitious payees and the bankers can debit the acceptor's account with the sum so paid: *Bank of England* v. *Vagliano* (1891) A.C. 107; discussed in 7 L.Q.R. 216, 10 L.Q.R. 40.

2. A clerk, by false pretences, induces the plaintiff, his employer, to draw cheques in favour of B., a non-existing person. He then forges an endorsement in B.'s name, and negotiates the cheques to the defendant for value. The bankers pay the defendant. The plaintiff cannot recover from the defendant the money so paid: *Clutton* v. *Attenborough* (1897) A.C. 90; cf. *Vinden* v. *Hughes* (1905) 1 K.B. at p. 800.

3. N. was the assistant superintendent of the plaintiff, a life insurance company, and the local agent at one of its branches. N. sent in a number of fictitious applications for insurance in the names of existing persons. Subsequently he represented to the company that the insured persons were dead and that the claims were payable, and sent in to the head office claim papers with forged signatures. Thereupon the company sent to N. cheques made by the company in favour of the alleged claimants and payable at a branch of the defendant bank. N. forged the payees' names, and the cheques were presented to and paid by the bank in good faith (to whom or how did not appear) and the amounts charged to the company's account. Held, that under the circumstances the cheques must be regarded as payable to fictitious or non-existent persons, and therefore payable to bearer, and the bank was justified in paying and charging the company with the amounts: *London Life Ins. Co.* v. *Molsons Bank*, 1904, 8 O.L.R. 238.

4. The plaintiffs' confidential clerk made out a number of cheques to the order of various customers of the plaintiffs for sums not actually owing to the respective customers at the time the cheques were signed, obtained the plaintiffs' signature thereto, misappropriated the cheques, forged the payees' endorsements and negotiated the cheques with the defendant, who gave full value for them in good faith and obtained payment of them from the plaintiffs' bankers. Held, that the payees were not "fictitious" persons, and the plaintiffs were entitled to judgment for the amounts of the cheques: *Vinden* v. *Hughes* (1905) 1 K.B. 795.

5. W. by falsely representing to the plaintiff that he had agreed to purchase from K. certain shares then held by K. in a company, and that he had arranged to resell the shares at a profit, induced the plaintiff to agree to assist him in financing the transaction. For this purpose the plaintiff drew a cheque on the C. Bank payable to K. or order for the amount of the purchase-money, which cheque was delivered to W. in order that he might hand it to K. in payment for the shares. W. forged

K.'s endorsement to the cheque and paid it into his own account with the defendant bank, who credited him with the amount, and collected the money from the C. Bank. W. had not agreed to buy any shares from K., and K. had at the time no shares in the company. Held, that the payee was not a "fictitious person" and that the defendant bank was liable to pay to the plaintiff the amount of the cheque as damages for conversion of the cheque: *Macbeth* v. *North and South Wales Bank* (1906) 2 K.B. 718.

6. A bill purporting to be drawn by A. and endorsed in blank by C., the payee, is accepted supra protest for the honour of the drawer. It turns out that A.'s signature was forged, and that C. was a fictitious person. The acceptor for honour is estopped from setting up these facts if the bill is in the hands of a holder in due course: *Phillips* v. *im Thurm* (1856) 18 C.B.N.S. 694, L.R. 1 C.P. 463.

7. By arrangement between the endorsee and acceptor a bill is drawn and endorsed in the name of a deceased person. The endorsee can recover from the acceptor: *Ashpitel* v. *Bryan* (1863) 33 L.J. Q.B. 328; cf. *Vagliano* v. *Bank of England* (1889) 23 Q.B.D. at p. 260.

THE CASES COMPARED:—

The *Vagliano Case* was applied by the Court of Appeal for Ontario in *London Life* v. *Molsons Bank* (1904) 8 O.L.R. 238, In the *London Life Case* there was a real drawer. In the *Vagliano Case* the name of the pretended drawee was forged, but the acceptor was estopped from denying the genuineness of the drawer's signature. In neither case was there any genuine transaction on which the bills could be based. A real difference between the two cases is that in the *London Life Case* the drawer really intended its cheques to be paid to the named payees while in the *Vagliano Case* the drawer had no intention to pay any one, his name having been forged.

In *Clutton* v. *Attenborough* (1897) A.C. 90 the drawers believed and intended the cheque to be payable to the order of

a real person, but in fact there was no such person as the named payee, and it was held that the case came within the section, and the cheque might be treated as payable to bearer.

Both the *Vagliano Case* and *Clutton* v. *Attenborough* were distinguished in *Vinden* v. *Hughes* (1905) 1 K.B. 795. In that case the drawers signed cheques at the instance of their clerk and cashier in favour of various customers to whom the drawers did not owe anything or did not owe an amount equal to that mentioned in the cheques payable to them respectively. The clerk forged the payees' endorsements, and negotiated the cheques to a holder for value in good faith who in turn obtained payment from the drawers' bankers. Warrington, J., who tried the case distinguished *Clutton* v. *Attenborough* because there the payee was a non-existing rather than a fictitious person. He also distinguished the *Vagliano Case* because in that case there was no drawer in fact and the use of a name as payee was a mere fiction, whereas in the case before him the drawer intended to issue the document and intended to issue it with the name of the particular payee upon it, that payee being a real person. Warrington, J., refers especially to the judgment of Lord Herschell (1891) A.C. at p. 152, as summing up the meaning of "fictitious" as applied to a real person, namely that the payee is named "by way of pretence only, without the intention that he shall be the person to receive payment."

Vinden v. *Hughes* was approved and followed in the case of *Macbeth* v. *North and South Wales Bank* (1906) 2 K.B. 718, decided by Bray, J. Bray, J., at p. 725, says:—"The plaintiff was told that Kerr was an engineer formerly living at Bootle, but then near Manchester. That was true. He was told that Kerr had agreed to sell the 5,000 shares to White. That was untrue, and he in fact held no shares. There had been no such transaction, but the plaintiff believed the statements made to him, and made the cheque payable to Kerr in order that he and no one else should get the money. Can Kerr, under such circumstances, be said to be a fictitious payee? I will first examine the authorities. In *Vinden* v. *Hughes* (1905)

1 K.B. 795 the facts were in my opinion, indistinguishable from the present case. Vinden had a real person in his mind when he drew the cheque, although in fact the payee was not his creditor as he supposed, and had had no transaction with him giving rise to such a debt. He had been deceived by his clerk, but he intended the payee and no one else to receive the money. Warrington, J., held that the payee was not fictitious. He says (at p. 802): "It was not a mere pretence at the time he drew it. He had every reason to believe, and he did believe, that the cheques were being drawn in the ordinary course of business for the purpose of the money being paid to the persons whose names appeared on the face of those cheques." That seems to me to fit exactly the present case. . . . . Kerr was a real person intended by the plaintiff, the drawer, as I have found, to be the person who should receive payment. It is a fallacy to say that Kerr was fictitious because he had no shares and had never agreed to sell any to White. The plaintiff believed he had, and intended him, and no one else, to receive the money. It seems to me that when there is a real drawer who has designated an existing person as the payee and intended that that person should be the payee, it is impossible that that payee can be fictitious. I think that the word "fictitious" implies that the name has been inserted by the person who has put it in for some dishonest purpose, without any intention that the cheque should be paid to that person only, and therefore it is that such a drawer is not permitted to say what he did not intend, viz., that the cheque shall be paid to that person only, and the only way of effecting this is to say that it shall be payable to bearer. It matters not in my opinion how much the drawer of the cheque may have been deceived, if he honestly intends that the cheque shall be paid to the person designated by him. I think Warrington, J., has not in any way misread the judgments in *Bank of England* v. *Vagliano*. I think his decision and mine are really founded on the principles laid down in that case."

It is difficult to reconcile *Vinden* v. *Hughes* and *Macbeth* v. *North & South Wales Bank* with *London Life* v. *Molsons Bank*.

If Warrington and Bray, JJ., have not "misread the judgments in *Bank of England* v. *Vagliano*," the last mentioned case decides that a named payee, being a real person intended by the drawer to be the payee, is not "fictitious or non-existing" within the meaning of the section, notwithstanding that there is no real transaction between the drawer and the payee upon which the bill might be based and which would justify the payee in endorsing the bill. If, however, this proposition is applied to the facts in the *London Life Case*, one seems to be driven to a conclusion contrary to that at which the Court of Appeal for Ontario arrived. If the local insurance agent in that case had invented names instead of using the names of actual persons who lived in his district, cheques made out in favour of such invented names would have been payable to "non-existing" persons within the principle of *Clutton* v. *Attenborough*. The agent, for his own purposes and doubtless in order to lessen the risk of the company's discovering that the insurances had no real existence, used the names of real persons. Such persons were intended by the drawer, to receive payment. "It matters not in my opinion," says Bray, J., supra, "how much the drawer of the cheque may have been deceived if he honestly intends that the cheque shall be paid to the person designated by him." According to Bray, J., the principle of the statutory provision is that the drawer, who for some dishonest purpose has inserted the name of a fictitious or non-existing person, necessarily could not have intended that the cheque should be payable to such person only, and therefore he must be deemed to have made it payable to bearer.

In the Australian case of *City Bank* v. *Rowan* (1893) 14 N. S.W.R. (Law) 127, the facts were very similar to those in *Vinden* v. *Hughes*. It was falsely represented to the defendants that certain goods had been sold to them by James Shackell & Co. and were ready to be delivered, and the defendants were induced to become makers of a note in favour of the alleged vendors for the purchase price of the goods. In face the firm of James Shackell & Co., had ceased to exist, although James Shackell a

former member of the firm resided in Melbourne, where the firm formerly carried on business. The payees' name was forged and the note negotiated to the plaintiff who took in good faith. It would seem that the case might have been disposed of in the plaintiff's favour on the ground that the note was payable to a non-existing person. The Court reached the same conclusion, but based its decision upon the ground that the case fell "precisely within the law laid down in *Bank of England* v. *Vagliano*, which is to the effect that wherever the name inserted as that of payee in a bill or note is inserted without any intention that payment shall only be made in conformity therewith, the payee becomes a fictitious person within the meaning of the Bills of Exchange Act and that such bill or note may be treated by a legal holder as payable to bearer." It is not easy to see the application of this doctrine to the facts before the Court as the makers of the note did in fact intend that the named payees should receive payment in conformity with the terms of the note. The judgment then proceeds, as follows, laying down a similar doctrine to that upon which the Court of Appeal relied in the *London Life Case*: "Here James Shackell & Co. the supposed payee, even if an existing firm, had no interest in the note, no right to endorse it or be paid upon it, and as they had not, then no person as payee had any such right. The payees were accordingly fictitious persons, and the plaintiffs are therefore holders of this note as if it were payable to bearer, and may as such holders sue the defendants as makers."

When a bill is payable to the order of a fictitious person, it is obvious that a genuine endorsement can never be obtained. The Act makes such a bill payable to bearer. But inasmuch as a bill payable to one person, in the hands of another, is patently irregular, it is clear that the bill should be endorsed, and perhaps a bonâ fide holder would be just in endorsing it in the payee's name. Though the bill may be payable to bearer, it is clear that a holder who is party or privy to any fraud acquires no title. What the Act has done is to declare that the mere fact that a bill is payable to a fictitious person shall not

affect the rights of a person who has received or paid it in good faith: Chalmers, p. 23.

The signature of a fictitious person must be distinguished from (a) the forged signature of a real person, and (b) the signature of a real person using a fictitious name—for instance, John Smith may trade as "The Birmingham Hardware Company," and sign accordingly: Chalmers, p. 24; see also *Schultz* v. *Astley* (1836), 2 Bing. N.C. 544, where Thomas Wilson Richardson drew a bill as Thomas Wilson.

JOHN D. FALCONBRIDGE.

TORONTO, March, 1907.

THE STATUTE OF FRAUDS AS A DEFENCE.

Cases sometimes come before the Courts which raise very nice questions as to the Statute of Frauds, and particularly how far it can be relied on as a defence. Such a case may be shortly stated thus: A., the owner of a parcel of land, makes a verbal bargain with B. to the effect that A. will convey the land to B. and that on his so doing B. will pay $100 to C. A. conveys the land to B. and dies; and B. refuses to pay C. $100 and repudiates all liability therefor. C. thereupon sues B. to enforce the alleged contract, or in the event of his not being entitled to enforce the contract; then on the equitable ground that B. is trustee for him for $100. At the trial B. denies on oath the existence of the alleged bargain, but on the evidence it is found that it was in fact made: but the Statute of Frauds being set up, the problem the Court would have to solve would be what relief, if any, could be given to the plaintiff. The conclusion reached recently in such a case seems to have been this,—that the defendant was guilty of fraud in denying the existence of the contract, and that the Statute of Frauds was therefore no defence, and that the bargain amounted to an equitable assignment to C. of the $100, and that B. was liable to account to C. as trustee for the $100 equitably assigned.

It has been remarked that the effect of the decisions of Courts of Equity is often virtually to effect a repeal of statutes under the pretext of construing them, and it appears to us that the class of cases of which the foregoing is a specimen is justly open to that observation.

The supreme desire of British Courts of justice ought to be, and undoubtedly is, to effect substantial justice between litigants; and in cases of the kind we have mentioned the Court perceives or, thinks it perceives, that to give literal effect to the Statute of Frauds would be virtually to enable a defendant to perpetrate and profit by a fraud, whereas the statute, as its title shews, was intended to prevent frauds and perjuries. In the case we have put it may justly be said that the defendant has not only committed a fraud in denying and refusing to carry out the bargain, but he has, moreover, in order to carry out his fraud, committed wilful and corrupt perjury. Now it is certain that where that is the moral position of a defendant, he has no claim to anything but the strictest justice: but bad as his conduct from a moral standpoint may be, he is nevertheless entitled to have that measure of justice meted out to him; and, except in cases where courts of justice have a lawful discretion, no suitor is entitled to any more or any less.

The words of the 6th section of the Statute of Frauds (R.S.O. c. 338), are plain and explicit; why is not a defendant, no matter how bad he may be, entitled to rely on them? "All declarations or creations of trust or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

In the case we have put A. is the person by whom the alleged trust was created, and unfortunately A. has signed no paper or writing manifesting such trust. If C. were to sue A. or his representatives, to enforce the alleged trust, could he succeed? Manifestly not, assuming that the payment of the $100 was a mere matter of bounty. Is C. in any better position against

B? It is true that B. has received a conveyance of land upon the faith and assurance that he would pay C. $100, and it is a fraud on his part to refuse to carry out his part of the bargain; but upon whom is the fraud perpetrated? It is true C. suffers from the effect of the fraud, but the fraud appears to be one committed against A. and not against C. because as to C. B. owes no duty. If a trust was legally created, then C. would, of course, be cestui que trust and might properly claim an enforcement of the trust, but in the face of the explicit words of the statute, so far as A. purported to create a trust, what he did was "utterly void and of none effect" because not manifested by writing as required by the statute. There being therefore no valid trust created, the claim of C. against B. does not seem supportable on the ground that B. is in any sense a trustee for C. for the simple reason that there is no valid trust. C. is not injured in point of law because C. never had any legal or equitable position as a cestui que trust. At the same time it is manifest, and is found as a transparent fact, that B. is a rogue and has got possession of A.'s land on the fraudulent representation that he would do something which he has not done, and refuses to do. What then should be the course of justice, should the Statute of Frauds for the purposes of this case be repealed by the Court, as Courts have sometimes made bold to do? or should the Court rather adopt this position, viz., admit that the statute forms a valid and conclusive bar to the plaintiff asserting the existence of any trust in respect of the $100, but hold that it proves no bar to declaring that the deed was obtained by fraud and that the fraudulent grantee is a trustee for his grantor and his estate? Such a conclusion could not be reached however, at the suit of C. that would be the right of A.'s real representative. But it might be answered that C. might not get any benefit by the estate being revested in the grantor or his real representative. Probably not, at most he would have a moral claim only on that estate to carry out the intention of the original grantor, and ought he to have anything else? At the very best, is it not the case of an imperfect gift, which the intended

donee has no legal or equitable right to enforce? Such, seems to us, a preferable conclusion, to one which virtually overrides the plain and explicit words of a statute. To hold that there is judicial power to suspend or repeal statue law, is as dangerous a constitutional doctrine as to hold that the sovereign has any such power.

The conclusion which the Courts seem to be reaching is, that the 6th section of the Statute of Frauds (R.S.O. c. 338), can never be a defence to any person except the creator of the alleged trust, and that as to third persons, a parol trust is valid and binding notwithstanding the statute. Such a construction, however, of the statute practically amounts to a repeal of its express words as far as concerns a large class of cases and persons—and might lead to serious results. For instance in the case we have put, obvious complications might arise. Let us assume that there was a direct conflict of testimony between the plaintiff and defendant, and at the trial of the civil action the defendant is thought to have been guilty of perjury, but on criminal proceedings being instituted the defendant is acquitted, and the plaintiff is found to have been the perjurer; and in the meantime judgment is awarded and possibly executed in the civil action in favour of the real perjurer, and against the defendant on the supposition that he was guilty of an offence of which he has been found to be innocent. How could such a tangle be unravelled? Possibly by another action to set aside the judgment as obtained by fraud.

From what we have said it would appear that to hold that the statute cannot be a defence to a defendant who is thought to be guilty of fraud and perjury may in some cases prove a dangerous doctrine. The statute, it is true, is styled "for the prevention of frauds and perjuries," and, it is an ingenious, but we doubt whether it is a sound doctrine to say, that wherever the Court finds the defendant guilty of fraud and perjury the statute affords him no defence,—because, the statute being "for the prevention of frauds and perjuries," it has no application to such a case. But let us suppose that a defendant admits that

there was a parol trust attempted to be created, but relies on the statute and says it was null and void. He commits no perjury, does he commit a fraud because he relies on a statutory defence? It may not be a very reputable or morally honest defence, any more than is the defence of the Statute of Limitations pleaded as a bar to a debt honestly due, but still what right has any Court of justice to say that to set up a statutory defence is a fraud? We do not think any Court has said so directly, and therefore, we may conclude that to admit the parol trust, but to plead the statutory bar is not a fraud from a legal standpoint whatever it may be in foro conscientiæ. Then how does it become any less a defence because the defendant commits perjury in saying there was no parol trust? It may not unreasonably be said that the real object of the statute was to prevent the temptation to commit perjury by both plaintiffs and defendants, by laying down the hard and fast rule that in no case can an alleged trust be legally and validly proved unless it be in writing.

Where there is a direct conflict of testimony between two litigants it is generally manifest that one of them must be speaking falsely, but to say that wherever the Court finds the defendant is the perjurer he ipso facto loses the protection of the statute, may after all be holding out the strongest inducements to plaintiffs to suborn witnesses and commit perjury, an offence which was the very evil the statute was intended to prevent. If the Court were infallible in its detection of perjury there might be a little excuse for such a doctrine, but we all know Courts are liable to err and the apparently guileless, innocent witnesses do sometimes turn out to be the most specious and accomplished perjurers.

A case that promises to be of very considerable importance from a constitutional point of view has been directed to be re-argued during the present session of the Supreme Court after notification given to the Minister of Justice and the Attorneys-General of the provinces. The Canadian Pacific Railway, desir-

ing to insure itself against any loss which it might sustain by reason of fires caused by its engines upon its line in the State of Maine, applied to the Ottawa Fire Insurance Company and obtained its policy in terms which seemed to be broad enough to cover all kinds of property. Some time afterwards one of the Railway Company's engines set fire to some standing timber and caused a considerable devastation. When the Railway Company sent in its claim to the Insurance Company, it was met with a refusal to pay upon the ground that the Insurance Company had no authority to insure standing timber. It had power, it was said, to insure houses and chattels, but not to insure standing timber. The company's charter had been issued under the general Insurance Act of the Province of Ontario, and a close inspection of its charter and the general Act bore out the company's contention. The Railway Company then claimed that the Insurance Company had no power to do business in the State of Maine at all and asked a return of the premium upon the ground that no consideration had been given by the Insurance Company for it. The Insurance Company replied that although its charter was granted under Ontario legislation, yet that under a Dominion statute it had obtained a license to do business throughout the Dominion, and that the company thereupon became in effect a Dominion company. And it was argued that a Dominion company, at all events, could do business anywhere. The Court has now formulated four subjects for debate, which are as follows:—

1st. Is every charter issued by virtue of provincial legislation to be read subject to a constitutional limitation that it is prohibited to the company to carry on business beyond the limits of the province within which it is incorporated?

2nd. Can an insurance company incorporated by letters patent issued under the authority of a provincial Act carry on extra provincial or universal insurance business, i.e., make contracts and insure property outside of the province or make contracts within to insure property situate beyond?

3rd. Has a province power to prohibit or impose conditions

and restrictions upon extra provincial insurance companies which transact business within its limits?

4th. Has Parliament authority to authorize the Governor in Council to permit a company locally incorporated to transact business throughout the Dominion or in foreign countries?

Sir Richard Henn Collins, the Master of the Rolls, has been appointed to the vacancy created in the House of Lords by the death of Lord Davey, Lord Justice Cozens-Hardy becoming Master of the Rolls, and Mr. Justice Kennedy, Lord Justice in his place. Mr. Pickford, K.C., takes the vacant place in the King's Bench Division. Lord Loreburn, the Lord Chancellor, is congratulated upon these appointments, which are the reward of merit, rather than remuneration of political service, which, unfortunately, has for some time been the practice in this Dominion.

The much discussed change in the Long Vacation in England has at length been decided upon, so that it will, in 1907, commence on the 1st day of August and terminate on the 11th day of October. This change will, it is said, be hailed with much satisfaction by the profession and the litigating public in England.

We are told that the female juror has appeared in Denver, Colorado, and appropriately in a divorce case. The principal difficulty seems to have arisen when the judge commenced his charge:—"Gentlemen of the jury"—and then, seeing a reproachful smile upon a young lady with golden hair and blue eyes in the box, added—"and lady of the jury." The world moves on.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

COMPANY—DEBENTURE HOLDER—FLOATING SECURITY—RECEIVER —ATTACHING CREDITOR—ORDER TO PAY OVER—PRIORITY— "CLERK OR SERVANT."

Cairney v. *Back* (1906) 2 K.B. 746 was an interpleader issue between the debenture holder of a limited company whose debenture was a floating security on all the assets of the company, and an attaching creditor of the company who had obtained an order on a debtor of the company to pay over the debt due. On the 15th June, 1906, the creditor had obtained judgment against the company and on the same day he obtained a garnishee order attaching a debt due by the Bank of Scotland to the company. On the 18th June the debenture holder was notified of this order and on the 25th June an order was made for the bank to pay to the attaching creditor the debt attached. Before the money was paid the debenture holder on the 29th June obtained the appointment of a receiver of all the assets of the company, and the bank, being notified thereof, paid the money into Court and an interpleader issue was ordered. Walton, J., in these circumstances held that the debenture holder was entitled to priority over the attaching order and the order to pay over, on the ground that they do not transfer to the garnishor the property in the garnished debt. The attaching order created a charge, but subject to the prior existing charge in favour of the debenture holder, whose prior rights were preserved by the appointment of the receiver at any time before actual payment of the money. A further question in the case was whether the attaching creditor was entitled to preferential payment as being "a clerk or servant of" the company. According to the evidence he was secretary of the company, but did not give his whole time to the work, but attended about 2 hours a day, and provided a clerk who was in constant attendance during business hours. Walton, J., was of the opinion that a secretary who gave his whole time to the office might be deemed a "clerk or servant," but one who gave only partial service and discharged the general duties of the office by a clerk appointed and paid by himself, is not a "clerk or servant" within the statute entitling persons of that class to preferential payments.

LANDLORD AND TENANT—GOODS OF LODGER—ILLEGAL DISTRESS—LIABILITY OF BAILIFF TO AN ACTION—LODGERS' GOODS PROTECTION ACT 1871 (34 & 35 VICT. C. 79), S. 2—(R.S.O. C. 170, SS. 39, 40).

In *Lowe* v. *Dorling* (1906) 2 K.B. 772 the Court of Appeal (Collins, M.R. and Moulton, and Farwell, L.JJ.), have affirmed the judgment of the Divisional Court (1905) 2 K.B. 501 (noted ante, vol. 41, p. 787). The facts were simple, a landlord distrained for rent, and under the distress the bailiff seized the plaintiff's piano. The plaintiff made and served a declaration of ownership under the Lodgers' Protection Act, 1871 (see R. S.O. c. 170, ss. 39, 40), notwithstanding this the bailiff sold the piano. The plaintiff sued the bailiff for illegal distress. The only point in the case was whether the plaintiff had any right of action against the bailiff, and whether his only remedy was against the landlord. The Divisional Court held that the bailiff was liable and that conclusion is now affirmed.

SHIP—CHARTERER—BILL OF LADING INCREASING LIABILITY OF SHIPOWNER—INDEMNITY BY CHARTERER.

In *Moel Tryvan Ship Co.* v. *Kruger* (1906) 2 K.B. 792 the defendants chartered a ship from the plaintiffs; the charter-party contained a clause exempting the plaintiff from liability for losses caused by the negligence of the master or crew. The master was thereby bound to sign bills of lading is required, but without prejudice to the charter-party. The defendants presented to the master for his signature, and he signed, bills of lading which did not in fact, (though the master thought that they did) contain any clause exempting the owners from losses occasioned by the negligence of the master or crew. The ship was wrecked through the negligence of the master, and in consequence of the omission of the negligence clause in the bill of lading, the owners were made liable for the loss to third parties who were holders of the bill of lading; and they now claimed that the loss having been caused by the defendants having got the master to sign the bills of lading without the negligence clause, they were bound to indemnify the plaintiffs against the loss; and Phillimore, J., held that, in the circumstances, there was an implied agreement on the party of the defendants to indemnify the plaintiffs, and judgment was accordingly given in their favour.

SHIP—CONTRACT OF CARRIAGE—CONSTRUCTION—DAMAGE CAPABLE OF BEING INSURED.

Nelson v. *Nelson* (1906) 2 K.B. 804 was an action to recover damages for breach of a contract for the carriage of goods by sea. The agreement inter alia exempted the defendants from liability for damages caused by unseaworthiness or unfitness of the ship in which the goods were to be carried "provided all reasonable means have been taken to provide against unseaworthiness"; and the defendants were not to be liable for any damage to the goods which should be capable of being covered by insurance, or which should be wholly or in part paid for by insurance. The goods were damaged by reason of the unseaworthiness of the ship and the defendants had not taken reasonable means to provide against such unseaworthiness. The plaintiffs were partially covered by insurance and they had been paid the amount of the insurance; they claimed to recover the residue of the loss from the defendants, on the ground of their negligence. The jury assessed the damages of the plaintiff at £23,900. The defendants relied on the insurance clause, but Bray, J., held that the case came within the well settled rule of law that in shipping documents of the character of that in question, in the absence of a clear intention to the contrary, the exceptions do not affect the obligation of the ship-owner to provide a ship fit for the cargo at the commencement of the voyage, and he considered the case governed by *Price* v. *Union Lighterage Co.* (1903) 1 K.B. 750, and gave judgment for the plaintiffs.

MINES—SALT—UNDERGROUND BRINE—RIGHTS OF ADJOINING OWNERS TO PUMP BRINE.

The Salt Union v. *Brunner* (1906) 2 K.B. 822 was a somewhat curious case. The plaintiffs and defendants were adjoining proprietors of mines of rock salt. The surface water percolating through dissolved the salt and produced brine which flowed in underground channels which could not be closed. The defendants pumped up this brine, and in so doing the plaintiffs claimed that the defendants wrongfully took salt which had been dissolved from the rock salt of the plaintiffs' mine. In these circumstances Lord Alverstone, C.J., held that the defendants were not guilty of any trespass and that the action failed.

PROBATE—SOLE EXECUTRIX INCAPABLE OF ACTING—ADMINISTRATION WITH WILL ANNEXED—GRANT TO NOMINEE OF EXECUTOR—COURT OF PROBATE ACT (20 & 21 VICT. C. 77), S. 73—(R.S.O. C. 59, S. 59).

Re Davis (1906) P. 330, was an application for the grant of letters of administration with the will annexed to the nominees of a sole executrix and universal legatee who by reason of her advanced age was incapable of acting. Deane, J., granted the application as being authorized under s. 73 of the Probate Act (see R.S.O. c. 59, s. 59).

ADMIRALTY—SALVAGE—APPRAISEMENT — RE-OPENING APPRAISEMENT.

The Hohenzollern (1906) P. 339 is a case which serves to shew the great difference in the way in which property may be estimated when it is to be the basis on which the owners are to pay salvage, and when it is to be the basis on which they seek to recover its value from a third party. In this case which was a suit for salvage the defendants filed an affidavit estimating the value of the vessel and cargo salved as follows: the vessel at £25,500 and the cargo at £7,400. Appraisers were appointed to make a valuation and they reported the vessel to be worth £51,500 and the cargo £9,650. The defendants applied to re-open the appraisement and the Court appointed an independent valuation to be made and the value so assessed was for the vessel £52,800 and the cargo £8,303. In these circumstances Deane, J., held there was no ground for re-opening the first appraisement which was accordingly held binding on the parties and the salvage was awarded on the basis thereof.

MINES—EXPROPRIATION OF LANDS FOR PUBLIC PURPOSES—COMMON LAW RIGHT OF EXPROPRIATOR TO SUPPORT FROM ADJOINING LAND.

In *Manchester* v. *New Moss Colliery* (1906) 2 Ch. 564, the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) have held that where a corporation, under the provisions of a statute, expropriate land including the minerals thereunder for the purpose of a reservoir, they acquire the common law rights of their vendor to support from the minerals under adjoining land, and are entitled to an injunction to restrain the working of such minerals so as to cause a subsidence of the surface of

the land expropriated; and that, statutory provisions providing for compensation in case the expropriators desire to restrain the working of minerals under the land expropriated but not acquired by the expropriators, had no application.

ADMINISTRATION OF ASSETS—EXECUTOR—PREFERENTIAL PAYMENT —SPECIALTY DEBT—ADMINISTRATION OF ESTATES ACT, 1869 (32 & 33 VICT. C. 46)—(R.S.O. C. 129, S. 34).

In re Samson, Robbins v. *Alexander* (1906) 2 Ch. 584 seems to shew that there is a material difference in the wording of the Imperial Statutes 32 & 33 Vict. c. 46 and R.S.O. c. 129, s. 34. By the former which also abolishes the distinction between specialty and simple contract debts as far as the administration of the estates of deceased persons is concerned, it is provided that they "shall be treated as standing in equal degree and be paid accordingly"; whereas the Ontario Act says they shall be paid pari passu and without any preference or priority." Under the English Act it is held by the Court of Appeal (Williams, Moulton and Buckley L.JJ.), that there is no obligation on a personal representative to pay debts pari passu, but that the effect of the Act is simply to take away the priority of specialty debts, leaving the personal representative at liberty to pay them in any order he pleases.

COPYRIGHT—AGREEMENT FOR EXCLUSIVE PUBLICATION—AUTHOR AND PUBLISHER—ASSIGNMENT OF COPYRIGHT—COPYRIGHT ACT, 1842 (5 & 6 VICT. C. 45) SS. 2, 13.

Re Jude (1906) 2 Ch. 595 was an application by an author under the Copyright Act, 1842, to remove from the register of copyrights the names of the respondents, Reid Brothers, as owners of the copyright in certain musical works composed by the applicant. The applicant had registered himself as the proprietor of the copyright in the musical compositions in question, and by agreement with one Newsome, it was provided that Newsome should have the sole and exclusive right of printing and publishing them, subject to the conditions (1) that Newsome should bear the cost of printing and publishing (2) that Newsome should pay Jude a royalty of 6d. per copy (3) that Newsome should furnish Jude with any number of copies he might require at 1s. 6d. per copy and on these copies no royalty was to be payable. Jude subsequently borrowed £100

from one Riley and as security for the loan he charged all his interest in the musical works in question and gave him a power to sell same and agreed to execute any further assignment. The loan was not repaid, and Riley assigned his rights under this agreement to Newsome who assigned the same together with his rights under the prior agreement to Reid Brothers who thereunder claimed to be assignees of the copyright. Kekewich, J., however, was of the opinion that there had been no effectual assignment of the copyright, that the first agreement was merely one for publishing and did not involve a transfer of the copyright; and as regards the mortgage or charge the transfer by Riley to Newsome and from him to Reid Bros. merely amounted to an assignment of the charge but not, as the respondents claimed, an exercise of the power of sale. The application was therefore granted.

WILL—POWER TO EXECUTORS TO RETAIN SECURITIES—HAZARDOUS SECURITIES—TENANT FOR LIFE AND REMAINDERMAN—RULE IN HOWE V. DARTMOUTH, 7 VES. 137A.

In *Re Bates, Hodgson* v. *Bates* (1907) 1 Ch. 22, Kekewich, J., had to consider the application of the rule laid down in *Howe* v. *Dartmouth*, 7 Ves. 137a. In this case the testator had at the time of his death 336 fully paid up shares in a coal company which had power to carry on business as collieryowners and workers, and ship owners and carriers, etc. He gave his executors and trustees power to retain investments belonging to him at the time of his death for such period as they might think fit without being responsible for any loss occasioned thereby and gave the income to his wife for life and after her death over. The questions raised were whether the trustees, notwithtsanding the power to retain were nevertheless bound to realize the shares above referred to, and whether until realization the tenant for life was entitled to the whole income thereof, or only such sum as would be payable if the shares were sold and proceeds invested in securities proper for trustees to invest in. Kekewich, J., was of the opinion that the shares in question did not come under the head of what are called wasting securities which he defined to be those the value of which from the intrinsic nature of the security decreases from day to day e.g., leaseholds or annuities. He considered however that they were hazardous, but that under the power in that behalf they might properly retain them and so long as they did so the tenant for life was entitled to the full income.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] BANK OF MONTREAL *v.* THE KING. [Feb. 19.

Banks and banking—Forged cheque—Payment by drawee—Liability to customer—Payment to forger by third party—Recourse over.

A clerk in a department of the Government of Canada, whose duty was to examine and check its account with the Bank of Montreal, forged departmental cheques and deposited them to his credit in other banks. The forgeries were not discovered until some months after these cheques had been paid by the drawee to the several other banks, on presentation, and charged against the Receiver-General on the account of the department with the Bank of Montreal. None of the cheques were marked with the drawee's acceptance before payment. In the meantime, the accountant of the department, being deceived by false returns of checking by the clerk, acknowledged the correctness of the statements of the account as furnished by the bank where it was kept. In an action by the Crown to recover the amount so paid upon the forged cheques and charged against the Receiver-General.

Held, affirming the judgment appealed from (11 Ont. L.R. 595), that the Bank of Montreal was liable unless the Crown was estopped from setting up the forgery.

Per DAVIES, IDINGTON and DUFF, JJ., that estoppel could not be invoked against the Crown.

Per GIROUARD and MACLENNAN, JJ., that, apart from the question of the Crown being subject to estoppel, under the circumstances of this case, a private person would not have been estopped had his name been forged as drawer of the cheques.

Per DAVIES and IDINGTON, JJ.—The acknowledgment by the accountant of the department of the correctness of the statements furnished by the bank, being made under a mistake as to the facts, the accounts might be re-opened to have the mistake rectified:

The defendant bank makes claims against the other banks, as third parties, as indorsers or as having received money paid by mistake, for the reimbursement of the several amounts so paid to them, respectively. On these third party issues, it was held:—

Per GIROUARD and MACLENNAN, JJ.—The drawee, having paid the cheques on which the name of its customer was forged, could not recover the amounts thereof from holders in due course. *Price* v. *Neal*, 4 Burr. 1355, followed.

Per DAVIES and IDINGTON, JJ.—As the third party banks relied upon the representation that the cheques were genuine, which was to be implied from their payment on presentation, and, subsequently, paid out the funds to their depositor or on his order, the drawee was estopped and could not recover the amounts so paid from them either as indorsers or as for money paid to them under mistake.

In the result, the judgment appealed from (11 O.L.R. 595) was affirmed.

Shepley, K.C., *Gormully*, K.C., and *Orde*, for appellants. *Aylesworth*, K.C., Atty.-Gen. of Canada, and *J. H. Moss*, for respondent. *Lafleur*, K.C., and *Matheson*, for Quebec Bank. *G. F. Henderson* and *A. Green*, for Royal Bank. *J. A. Ritchie*, for Sovereign Bank.

Ont.] TORONTO RY. CO. *v.* MULVANEY. [Feb. 19.

Negligence—Street railway—Excessive speed—Gong not sounded—Contributory negligence—Damages.

A passenger on a street car in Toronto going west alighted on the side furthest from the other track and passed in front of the car to cross to the opposite side of the street. The space between the two tracks was very narrow, and seeing a car coming from the west as she was about to step on the track she recoiled and at the same time the car she left started and she was crushed between the two receiving injuries from which she died. In an action by her father and mother for damages the jury found that the company was negligent in running the east bound car at excessive speed and not sounding the gong before starting the west bound car. They found also that deceased was negligent, but that the company could, nevertheless, have avoided the accident by the exercise of reasonable care.

Held, that the case having been submitted to the jury with a charge not objected to by defendants and the evidence justifying the findings the verdict for the plaintiffs should not be disturbed.

The plaintiffs should not have had the funeral and other expenses incurred by the father of deceased allowed as damages in the action. Appeal dismissed with costs.

W. Nesbitt, K.C., for appellants. *Davidson,* for respondent.

Ex. Ct.] [Feb. 19.

THE "D. C. WHITNEY" *v.* ST. CLAIR NAV. CO.

Admiralty law—Foreign bottoms—Collision in foreign waters —Jurisdiction.

A foreign vessel passing through a river dividing Canada from the United States under a treaty allowing free passage to ships of both nations is not, even when on the Canadian side, within Canadian control so as to be subject to arrest on a warrant from the Court of Admiralty. The warrant to arrest a foreign vessel cannot be issued until she is within the jurisdiction of the Court.

Quaere: Have the Courts of Admiralty in Canada the same jurisdiction as those in England to try an action in rem by one foreign ship against another for damages incurred by a collision in foreign waters?

Judgment of the Exchequer Court, Toronto Admiralty District, 10 Ex. C. R., reversed, IDINGTON, J., dissenting.

W. D. McPherson, for appellants. *J. W. Hanna,* for respondents.

N.B.] ALLCROFT *v.* ADAMS. [Feb. 19.

Master and servant—Wrongful dismissal—Contract of hiring— Capacity—Statute of Frauds.

The manager of a veneer company having heard of plaintiff as likely to be useful in the business wrote to him saying: "What we want is a man who is a good veneer maker and knows how to make all kinds of built-up woods that are salable. We want you to take full charge of the mill, that is the manufactur-

ing." Plaintiff answered: "I understand fully the making of such articles as you speak of as well as others"; and in a later letter he said: "I feel from all the experience I have had I have mastered the entire principle of it (the business). I can at all times lay my hands on good competent machine men who know their business as also instruct those who do not." Subsequently plaintiff was hired by the company but was dismissed in six weeks.

Held, reversing the judgment of the Supreme Court of New Brunswick, 37 N.B. Rep. 332. IDINGTON, J., dissenting, that plaintiff was not hired as a general manager of the company's business but as an expert in veneer work, and as the evidence shewed he was not competent he was rightly dismissed.

Held, also, that defendants could not rely on the Statute of Frauds which, though pleaded, was not set up at the trial nor before the Supreme Court of New Brunswick, en banc. Appeal allowed with costs.

F. R. Taylor, for appellants. *Teed,* K.C., and *Jonah,* for respondent.

N.W.T.] GILBERT *v.* THE KING. [Feb. 28.

Indictment for murder—Evidence—Statements of victim—Res gestæ—Murder or manslaughter—Reserved case.

Evidence of statements made immediately after an assault by a person, since deceased, under apprehension of further danger and requesting assistance and protection, is admissible as part of the res gestæ, even though the person accused of the offence were absent at the time when such statements were made. *Reg.* v. *Beddingfield,* 14 Cox 342; *Reg.* v. *Foster,* 6 C. & P. 385, and *Aveson* v. *Kinnaird,* 6 East 188, followed.

Statements not coincident, in point of time, with the occurrence of the assault, but uttered in the presence and hearing of the accused and under such circumstances that he might reasonably have been expected to make some explanatory reply or remark in reference to them, are admissible as evidence.

On the trial of an indictment for murder the evidence was that the deceased had been killed by a gun shot wound inflicted through the discharge of a gun in the hands of the accused and the defence was that the gun had been discharged accidentally.

Held, that, in view of the character of the defence and the

evidence in support of it, there could be no objection to a charge by the trial judge to the jury that the offence could not be reduced by them from murder to manslaughter, but that their verdict should be either for acquittal or one of guilty of murder.

Two questions were reserved by the trial judge for the opinion of the Court of Appeal, but he refused to reserve a third question, as to the correctness of his charge on the ground that no objection to the charge had been taken at the trial. The Court of Appeal took all three questions into consideration and dismissed the appeal, there being no dissent from the affirmance of the conviction on the first and third questions, but one of the judges being of opinion that the appeal should be allowed and a new trial ordered upon the second question reserved. On an appeal to the Supreme Court of Canada.

The majority of the Court, being of opinion that the appeal should be dismissed, declined to express any opinion as to whether or not an appeal would lie upon questions as to which there had been no dissent in the Court appealed from, but it was held,

Per GIROUARD, J.—That the Supreme Court of Canada was precluded from expressing an opinion on points of law as to which there had been no dissent in the Court appealed from. *McIntosh* v. *The Queen*, 23 S.C.R. 180, followed. *Viau* v. *The Queen*, 29 S.C.R. 90; *Union Colliery Co.* v. *The Queen*, 31 Can. S.C.R. 81, and *Rice* v. *The Queen*, 32 Can. S.C.R. 480, referred to. Appeal dismissed with costs.

Chrysler, K.C., and *Balfour*, for appellant. *Latchford*, K.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Britton, J.] BYERS *v.* KIDD. [Dec. 5, 1906.

Costs—Defamation—Verdict for defendant—Depriving defendants of costs—Discretion.

In the exercise of his discretion in depriving a successful defendant of his costs in an action of slander, the trial judge is not obliged to find under Consol. Rule 1130, what would

necessarily be good cause under the English Order 65, but at the same time he must not exercise his discretion arbitrarily, but for a reason which satisfies him that it should be so exercised.

In such an action a successful defendant was disallowed his costs, where the trial judge was satisfied that the defendant by his conduct had provoked the litigation, and had really made use of the words attributed to him, notwithstanding the finding of the jury to the contrary, and had refused to carry out a proposed settlement which he had at first acceded to, and the jury had intimated that the costs should be equally divided between the parties.

R. F. McWilliams, for plaintiff. *D. O'Connell,* for defendant.

Mulock, C.J. Ex.D.] [Dec. 12, 1906.

GYORGY *v.* DAWSON.

Master and servant—Injury to servant—Death of servant—Negligence—Foreigner—Action for benefit of.

The administrator within this province of a foreigner who had resided herein and was killed in an accident, through his employer's negligence, is entitled, under the amendment to Lord Campbell's Act, as embodied in s. 2 of the R.S.O. 1897, c. 166, to maintain an action on behalf of the deceased's family, foreigners residing out of Canada, for the recovery of damages sustained by reason of his death.

F. W. Griffiths and *Maguire,* for plaintiff. *F. W. Hill* and *T. F. Battle,* for defendants.

Divisional Court.] [Dec. 20, 1906.

LONDON AND WESTERN TRUST CO. *v.* CANADIAN FIRE INS. CO.

Fire insurance—Lease—Change in nature of risk—Absence of notice or knowledge by landlord—Control of landlord—Omission to notify company.

After the owner of dwelling-house property, had effected an insurance thereon, he leased the premises to a tenant, who, without the owner's knowledge or consent, changed the occupation thereof, by bringing in a stock of goods, which he sold out to pedlers.

Held, that the owner was not affected by the second statutory condition, which required notice of any change material to the risk, which was within the control or knowledge of the insured, to be given to the company, etc., for the premises being under lease, were not under the owner's control, while the change in the occupation was without his knowledge or consent. Judgment of FALCONBRIDGE, C.J.K.B., at the trial reversed.

Gibbons, K.C., for plaintiffs. *Rowell,* K.C., for respondents.

Divisional Court.] [Dec. 21, 1906.

ADAMS *v.* FAIRWEATHER.

Way—Public lane—Strip of land adjoining used as part of—User—Easement.

To constitute a legal possession of land, not only must there be a corporal detention, or that quasi-detention, which, according to the nature of the right, is equivalent thereto, but also the intention to act as owners of the land, no legal possession is acquired by the exercise of a supposed right as one of the public. The rear portions of the plaintiffs and the defendants' lands abutted on a public lane, the defendants' rear fence being some eleven feet from the boundary of the lane, leaving the strip between the fence and the boundary unenclosed. The plaintiff, for over 20 years, believing this strip to be a part of the lane, had been accustomed to drive over it to get to his stable, doing so in the exercise of a supposed right as one of the public, and not as an easement to his land.

Held, that the plaintiff had not acquired any right to use the said strip.

H. E. Rose, for appellant. *W. H. Blake,* for respondent.

Falconbridge, C.J.K.B., Britton and Riddell, JJ.]

[Dec. 24, 1906.

TOWNSHIP OF AMELIASBURG *v.* PITCHER.

Prohibition — Division Court — Interpretation of statute — Jurisdiction.

Where it is necessary to interprete a statute in order to find out whether the Division Court should decide the rights of

the parties at all, if the Divisional Court Judge misinterprets the statute and so gives himself jurisdiction to decide such rights prohibition will lie: but if it be necessary to interpret a statute simply to decide the rights of the parties prohibition will not lie, however far astray the Division Court Judge may go.

In re Long Point Co. v. *Anderson* (1891) 18 A.R. 401 followed.

C. J. Holman, K.C., for the appeal. *W. S. Morden*, contra.

Divisional Court.] [Jan. 14.

CUMMINGS *v.* TOWN OF DUNDAS.

Highway — Stream — Breaking through dams — Bridge over stream—Stopping flow of water—Destruction of highway —Duty of municipality to repair—Damages—Mandamus— Indictment—Injunction.

Where the destruction of a highway is caused by the gradual encroachment of the sea or lake, arising from natural causes, the water occupying the former location of the highway, which no longer exists, whereby there is a change of ownership in the land encroached upon, it becoming vested in the Crown, and available for purposes of navigation, there is no liability on the municipality, by virtue of its duty to keep highways in repair, to replace the highway; but where the element of ownership does not arise, a duty to repair may exist where the destruction is of such a character, taking into consideration the cost of repair, that the restoration of the highway may not unreasonably be regarded as coming within the bounds of such duty. In the high lands above the plaintiff's land, in the town of Dundas, two streams became united, forming a creek, which flowed down past the plaintiff's land; a couple of dams in the creek, built some 60 years ago, had become broken, whereby large quantities of stones, sand and other debris were carried down and deposited in the channel adjacent to the plaintiff's land, the accumulation being added to by a bridge across the creek, built by a railway company, which choked the flow of water, in itself sluggish, the effect being that a portion of the highway in front of the plaintiff's land, and being the only mode of ingress and egress to and from it, was washed away, rendering it very difficult for two vehicles to pass each other. It was shewn that by removing the check to the flow of water, caused by the bridge,

and by the expenditure of $150 a road way 30 feet wide could be furnished, while, at a cost of $800 a permanent and satisfactory roadway could be provided.

Held, no question of ownership arising, and taking into consideration the cost of repair, the destruction of the highway was not of that character as would relieve the municipality of the size of the defendants from its obligation to repair, and that they were liable to the plaintiff, for the damages he had sustained by reason of their neglect to so repair.

A mandamus will not be granted in such a case. If the relief sought was as one of the public the remedy would be by indictment. An injunction was also refused, it not appearing that the municipality had interfered with the flow of the water. Judgment of STREET, J., 10 O.L.R. 300, reversed.

E. D. Armous, K.C., for plaintiff, appellant. *J. W. Nesbitt*, K.C., and *H. C. Gwyn*, for defendants, respondents.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] STEELE *v.* PRITCHARD. [Jan. 15.

Action of deceit—False representation—Fraud.

The findings of fact by the learned trial judge were that the then plaintiffs bought a tract of land consisting of about 47,000 acres in six separate townships from the defendants who held it under option from the Ontario and Saskatchewan Land Co.; that the 47,000 acres were part of a larger tract of land, which the Land Company had acquired from the Canadian Pacific Railway Co., out of which 7,800 acres had been sold; that the 7,800 acres were on the average worth $2.20 per acre more than the 47,000 acres; that the defendants represented to two of the plaintiffs that the 47,000 acres were all that the Land Company even owned in the six townships named, and that the two plaintiffs had been induced by such representation to become co-purchasers with Steele of the 47,000 acres at $6.60 per acre. The judge also found that, at the time the representation was made,

the defendants had no information at all as to the matter represented.

Held, that the proper inference to be drawn was that the defendants at the time they made the representation had no belief in its truth and that, upon the principles laid down in *Derry* v. *Peek*, 14 A.C. 337, they were liable in damages to the two plaintiffs for their shares of the difference between the average value of the lands received and the average value of the whole original holding of the selling company, calculated however only in respect of a 15/47 interest in the land as the then plaintiffs had sold 32/47 interest in it before the action.

I. Campbell, K.C., and *Wilson*, for plaintiffs. *Bradshaw* and *Johnson*, for defendants.

Mathers, J.] MOORE *v.* SCOTT. [Jan. 15.

Practice—Security for costs—Second application—King's Bench Act, Rule 987.

Application by defendants for increased security for costs after judgment in their favour and pending an appeal by the plaintiff. When first sued, defendants took out the ordinary præcipe order for security upon which plaintiff paid $200 into Court. They now shewed that their taxed costs amounted to $444 and that the costs of the appeal would be at least $300 more.

Held, following *Standard Trading Co.* v. *Seybold*, 5 O.L.R. 8, that the præcipe order was no bar to the application and that further security to the extent of 400 should be furnished. *Charlebois* v. *G.N.W. Central Ry. Co.*, 9 M.R. 60, distinguished.

J. F. Fischer, for plaintiff. *Burbidge*, for defendant.

Mathers, J.] [Jan. 15.

CAMPBELL *v.* CANADIAN CO-OPERATIVE CO.

Negligence—Undertaking of mortgage company to keep up insurance on mortgaged property—Undertaking not under seal—Setting off unliquidated damages against debt—Right of set-off as against assignee of debt—Notice of assignment.

The defendant investment company having a mortgage for $2,000 on plaintiffs' hotel property, a short time before the ex-

piration of a policy of insurance in the Canadian Fire Insurance Co. for $1,400 on the building, held by the company as collateral to the loan, notified the plaintiff by letter that they intended to transfer the insurance at its expiration to another company, as they had power to do under the terms of the mortgage. The plaintiff then had a conversation by telephone with the secretary-treasurer of the company respecting the transfer of the insurance and received from him the assurance that the matter would be attended to. The company about the same time notified the Canadian Fire Insurance Co. not to renew its policy and wrote to the Occidental Fire Insurance Co. of Wawanesa, asking them to insure the property for the same amount from the date of the expiration of the Canadian fire policy. The investment company took no further steps to replace the insurance, and, after it had expired, the property was destroyed by fire.

Held, 1. The investment company was guilty of gross neglect in not carrying out its undertaking to keep the building insured and was liable to the plaintiff for the loss sustained by reason of such neglect.

The law on this point is as laid down by WILLES, J., in *Skelton* v. *L. & N. W. Ry. Co.*, L.R. 2 C.P. at p. 636, as follows:

"If a person undertakes to perform a voluntary act he is liable if he performs it improperly, but not if he neglects to perform it," and, as the company had taken steps towards carrying out its undertaking, they had brought themselves within that principle.

Although the company's undertaking was not under seal yet it was in respect of a matter in the usual course of its business and of a kind in which it becomes practically necessary to dispense with the seal by reason of the frequency of its occurrence and the company should be held liable.

After the expiration of the insurance and before the fire the investment company assigned the plaintiff's mortgage to its co-defendant the Northern Trust Co., but, as found by the trial judge, no notice of that assignment was given to the plaintiff before the loss.

Held, that, under s. 39 of the King's Bench Act, the plaintiff had the same right of setting off his claim for damages against the mortgage debt in the hands of the trust company as he would have had, if there had been no assignment. *Newfoundland* v. *Newfoundland*, 13 A.C. 213, followed.

Hull, for plaintiff. *Aikens*, K.C., and *Hugg*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] [Jan. 21.

CANADIAN BANK OF COMMERCE *v.* LEWIS.

Fixtures—Chattels—Bank safe built into rented property—Landlord and tenant—Agreement between as to removal of fixtures—Effect of agreement on subsequent purchaser of premises.

Plaintiff bank rented a building into which it moved a safe for the purposes of its banking business. The landlords at the request of the bank built around the safe a brick vault. After occupying the building about a year, the bank moved into premises of its own, and the building and safe were used by succeeding tenants until the sale of the property to defendants, who knew nothing of an alleged agreement between the bank and its landlords as to the right to remove the safe after the bank had left the premises. During the interim between the removal of the bank and the sale, certain improvements were effected in the building, one of which was the pulling down of the vault and the construction of a mezzanine floor which was partly supported by the safe.

Held, on appeal, reserving the judgment of HENDERSON, Co. J. (who decided that the safe was a chattel and had been bricked or built in merely for the purpose of its more convenient use as a chattel), that although the safe when enclosed in the vault, became a fixture, and although it could have been removed with the consent of the original owners of the building, yet that right was lost when the defendants bought the premises.

J. A. Russell, for defendants, appellants. *Davis*, K.C., for plaintiffs, respondents.

Full Court.] [Jan. 21.

DE BECK *v.* CANADA PERMANENT.

Mortgagor and mortgagee—Power of sale in mortgage—Orders nisi and absolute—Accounts—Rents, receipt of—Tender—Interest.

A mortgagee having obtained a foreclosure order nisi, shortly afterwards, and before the period allowed for making absolute

the order nisi had expired, entered into an agreement for the sale of the mortgaged premises to a purchaser who had knowledge of the foreclosure proceedings. The order absolute was never taken out. The agreement for sale was not deposited for registration for some three years after it was entered into, but a few months before its deposit for registration, a tender was made on behalf of plaintiffs of the amount due under the mortgage, which was refused on the ground that the property had been parted with and that the plaintiffs had lost their right to redeem.

Held (affirming the decision of HUNTER, C.J.), that the mortgagee could not, after the order nisi for foreclosure, and before it was made absolute, exercise his power of sale without the leave of the Court. *Stevens* v. *Theatres, Limited* (1903) 1 Ch. 857, and *Campbell* v. *Holyland* (1877) 7 Ch.D. 166 followed.

Bodwell, K.C., and *Shaw*, for appellant. *Davis*, K.C., and *Cayley*, for respondent.

Full Court.] [Jan. 21.

BRITISH COLUMBIA MILLS TIMBER AND TRADING CO. v. HORROBIN.

Mechanics' Lien Act, R.S.B.C., 1897, *c.* 132, *C.B. Stat.*, 1900, *c.* 20—*Material man—Lien by—Appropriation of payment on account.*

Defendant Horrobin contracted to build a house for defendant Henshaw. Horrobin contracted with plaintiff to supply the lumber and building materials. Previously to this, Horrobin, who was indebted to the plaintiffs, gave them a thirty day note for $1,700 on which, about due date, he paid them $1,000 on account, in doing which he overdrew his bank account by about that sum. A few days afterwards he was paid the sum of $1,200 by cheque, stated on its face to be "re Mrs. Henshaw." This cheque Horrobin endorsed over to his bank, making good his overdraft, which he had obtained on the strength of the promise of defendant Henshaw's payment. Plaintiffs applied the $1,000 payment to the reduction of the overdue note. Horrobin, through injuries received from a fall, was unable to give evidence at the trial, so that the statement by plaintiff's accountant that there was no appropriation by Horrobin of the $1,000 to defendant Henshaw's account, was not contradicted. Plain-

tiffs placed a lien on the building for $948.45. The trial judge came to the conclusion that the $1,700 note must have included some of the materials supplied for the house in question, and that defendant Henshaw was entitled to a credit of some amount which the accounts ought to shew, dismissed the action as against defendants Henshaw and Senkler, and gave judgment against defendant Horrobin, who in the meantime had become insolvent. Plaintiffs appealed.

Held, on appeal, that there had been no appropriation, but

Held, on the facts, that as there had been a shortage in delivery of lumber entitling defendant Henshaw to a certain credit the claim had been brought for too much and there should be a new trial.

Observations on the effect of granting a lien to a material man under the amendments of 1900.

Davis, K.C., for plaintiff, appellants. *Senkler,* K.C., for respondent, Henshaw.

Full Court.] BLUE *v.* RED MOUNTAIN RY. CO. [Jan. 21.

Railway right of way, what constitutes—Damages by fire caused by sparks from locomotive—Jury—Non-direction—Misdirection—Railway Act—1903, *c.* 58, *s.* 239.

Where a railway company cleared a right of way, but had not filed any plans of same under either the Dominion or Provincial Railway Acts, and, in an action for damages caused by fire alleged to have been set alight by sparks from one of their locomotives, contended that the right of way must be considered to be confined to the roadbed itself.

Held, 1. It must be considered that the company have occupied the full statutory allowance.

2. Following *Spencer* v. *Alaska Packers Association* (1904) 35 S.C.R. 362, that non-direction is not a ground for a new trial unless it causes a verdict against the weight of evidence; and in this case the only non-direction specifically complained of being that the jury should have been charged that a certain point was not within the railway right of way, and there being no evi-

dence on which the jury could find that such point was within the right of way, the learned judge would not have been justified in charging to that effect.

The jury, after answering several of certain specific questions gave a general verdict of $18,000 in objection to which s. 239 of the Dominion Railway Act was set up on appeal.

Held, that, there being a finding that the defendant company left inflammable material on their right of way, the section could not be invoked, as the limit only applies where there is no negligence. Appeal dismissed, MARTIN, J., dissentiente.

MacNeill, K.C., for defendants, appellants. *J. A. Macdonald*, K.C. and *Hamilton*, K.C., for respondents.

Bench and Bar.

Hon. Arthur Drysdale of the City of Halifax, K.C., to be a puisnè judge of the Supreme Court of Nova Scotia in the room and stead of Hon. D. C. Fraser, appointed Lieutenant-Governor of that Province. (Mar. 13, 1907).

Alexander George Cross of the City of Montreal, Esq., to be a puisnè judge of the Court of the King's Bench for the Province of Quebec in the room and stead of Hon. Robert Newton Hall resigned. (Mar. 11, 1907).

Ranald D. Gunn, of the Town of Orillia, in the Province of Ontario, barrister-at-law, to be Junior Judge of the Court Court of the County of Carleton, in the room and stead of His Honour John Joseph O'Meara, deceased. (Mar. 15, 1907.)

Flotsam and Jetsam.

In an Irish Court recently an old man was called into the witness box, and being infirm and just a little blind he went too far in more than one sense. Instead of going up the stairs that led to the box he mounted those that let to the Bench. Said the judge good-humouredly: "Is it a judge you want to be, my good man?" "Ah, sure, your Honour," was the reply. "I'm an ould man now, and mebbe it's all I'm fit for." The judge had no ready retort.—Tit-bits.

Canada Law Journal.

VOL. XLIII. APRIL 15. NO. 8.

THE DEFENCE OF INSANITY IN MURDER CASES—DEMENTIA AMERICANA.

"The long nightmare of the Thaw trial" as it has been aptly called, has at length come to a close, and it is to be hoped that the daily papers will no longer be filled with the nauseating details of the case. Three months of time and hundreds of thousands of dollars have been spent without producing, so far as at present appears, any notable contribution to the elucidation of the knotty problems connected with the defence of insanity in murder cases. The trial will probably be longest remembered for the cynical boldness with which the counsel for the defence, after spending weeks in the examination of medical experts, and expressly disclaiming the intention of resting his case upon anything but the "written law," chose in the closing sentences of his long and impassioned address to the jury, practically to change his plea to one of justification, defining his client's insanity as a species, which though it may be unknown to "learned alienists," "has been recognized in every court in every State in this Union from the Canadian border to the Gulf of Texas." "It is," he tells the jury, "the species of insanity which if you desire to give it a name, I will ask you to label it 'dementia Americana'."

It is unnecessary to state in detail how the orator imported by the defence from the Pacific slope proceeded to elaborate his definition, the general scope of which may be gathered from the astounding peroration in which he spoke of his client as being "an instrument in the hands of Providence," and with that lack of good taste and reverence which are everywhere conspicuous in his address compared him to Jonathan who wrought "great salvation in Israel!"

The counsel for the prosecution, as might have been expected, commented in very severe and sarcastic terms upon this extra-

ordinary plea, which, he said, had "no status east of the Mississippi." Jury addresses, however interesting to the public and effective for their special purpose, have not in general much value from a purely legal standpoint, and we only refer to the matter in order to point out that the law of the State of New York, as laid down by the presiding judge in his careful charge to the jury, appears to be very much in line with our own, on this confessedly difficult subject. Judge Fitzgerald evidently looks upon "dementia Americana" very much as a Canadian judge would regard a plea of "dementia Canadensis" in a similar case. It may be noticed also that the theory of the medical experts for the defence, who speak of an insanity described as "brain storm" or irresistible impulse, inciting to, and excusing homicide, receives as little countenance from the New York judge as it would in a Canadian tribunal. In fact the legal principles laid down in the charge are practically identical with those formulated in the provisions of the Canadian Criminal Code, the 11th section (sub-s. 1) of which reads as follows: "No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such act or omission was wrong." With this may be compared the following paragraph of the judge's charge: "The so-called irresistible impulse has no place in the law, and is not an excuse, nor is every person of disordered mind excused. As the burden of proof of insanity is on the defendant, he is also entitled to every reasonable doubt on the subject. If the defendant knew the nature or the quality of his act, or knew that the act was wrong, then he committed a crime."

The doctrines of the remaining sub-sections of s. 11 of the Canadian Code, asserting the legal presumption of sanity, and limiting the extent to which a specific delusion will excuse a man who is otherwise sane, were also referred to in the charge as being part and parcel of the American law.

As is well known, these provisions of the Canadian Code

are based upon what must be still regarded, in spite of much adverse comment, as the most authoritative exposition of the English law upon this subject, viz., the answers of the judges to the questions put to them by the House of Lords in *McNaghten's Case* (1843) 4 St. Tr. N.S. 847, from which we would make the following quotation as being particularly relevant to the case which has so exercised the minds of our neighbours during the past three months: "Notwithstanding the person accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime, that he was acting contrary to law; by which expression we mean the law of the land."

This dictum of the English judges is of special interest to Canadians, as on its application chiefly turned the fate of the accused in the celebrated case of *R.* v. *Riel* (1885) 1 Terr. R. 23. In that case it was argued with great skill and persistence by the present Chief Justice of Canada and the counsel associated with him in the defence of the unfortunate leader in the North-West Rebellion, that his treasonable acts were excused by insane delusions to which he was said to be subject, nor was there lacking the element of difference in opinion among the medical experts called as witnesses, which has been so prominent a feature in the Thaw case and others of the same kind. The opinions of the Canadian judges before whom the case came on appeal contain a very full and instructive discussion of the law as it then stood, which as already stated is very much the same as it is to-day under the Code.

It should be remarked, even in so slight a discussion as this, of a subject so vast and complex as the criminal responsibility of the insane, that the doctrines of the judges in *McNaghten's Case* have been vigorously assailed as being at all events incomplete in their scope, and it must be admitted that they seem to deal too exclusively with what may be called mental or intellect-

ual insanity, and to take little or no account of that equally real, and still more terrible form of the disease to which the name of "moral insanity" has sometimes been given. There is undoubtedly much force in what is alleged by a well-known authority on mental disease, when he says that "no one who has had much to do practically with insanity has the least doubt that a person labouring under it is constrained sometimes by his disease to do what he knows to be wrong having perhaps gone through unspeakable agony in his efforts to withstand the morbid impulse before he yielded to it at the last." It is obviously, however, difficult, if not impossible, to give legal form by statute or otherwise to considerations of this kind, to which, moreover, the common sense and humanity of judges and juries, and the application of the principle that the accused person is entitled to the benefit of any reasonable doubt, will as a general thing be found to allow the weight to which they are fairly entitled.

GOODWIN GIBSON.

IMPUTED NEGLIGENCE.

The doctrine of Identification in Negligence was first laid down in 1849, in the well-known case of *Torogood* v. *Bryan*, 8 C.B. 115. Although unfavourably commented upon, on different occasions, it was followed, in 1875, in the case of *Armstrong* v. *L. & Y. Railway Co.*, L.R. 10 Ex. 47, and finally over-ruled, in 1888, in the leading case of Mills v. Armstrong, L.R. 13 App. Cas. p. 1, better known as the "Bernina" case. Lord Watson, in his judgment, at page 18, says: "I am of opinion that there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified to any extent whatever with his negligence. He is the servant of the owner, not their servant; he does not look to them for orders, and they have no right to interfere with his conduct of the vehicle except, perhaps, the right of remonstrance,

when he is doing, or threatens to do, something that is wrong and inconsistent with their safety. Practically they have no greater measure of control over his actions than the passenger in a railway train has over the conduct of the engine-driver. I am, therefore, unable to assent to the principle upon which the case of *Thorogood* v. *Bryan* rests. In my opinion an ordinary passenger by an omnibus, or by a ship, is not affected, either in a question with contributory wrongdoers or with innocent third parties, by the negligence, in the one case, of the driver, and in the other of the master and crew by whom the ship is navigated, unless he actually assumes control over their actions, and thereby occasions mischief. In that case, he must, of course, be responsible for the consequences of his interference. Counsel for the appellants endeavoured to support *Thorogood* v. *Bryan* upon a totally different principle from that assigned by the learned judges who decided the case. They argued alternatively that the maxim 'respondeat superior' does not apply; and that passengers are affected by the wrongful acts of the driver, not because he is in any sense their servant, or subject to their control, but by reason of their being for the time under his dominion."

This doctrine of "identification" in negligence has been called the most curious instance that exists in the history of judge made law. The doctrine of "imputed" negligence has been termed a remnant of "identification" in negligence. Imputed negligence briefly expressed means, that the negligence of a person, to whose care a child is properly committed, is imputed by a fiction of law to the child as its own negligence, since the latter is incapable of either diligence or negligence. Or in other words, contributory negligence by the guardian or custodian of a child, without which the accident would not have happened, debars the child from recovering damages for injury sustained by the alleged negligence of a third party. The doctrine of imputed negligence dates from the case of *Waite* v. *North Eastern Railway Co.* (1858), E.B. & E. p. 719, and affirmed in the Court of Exchequer Chamber, E.B. & E. p. 728.

The facts of this case were simply these. The plaintiff, an infant of five years, was in the care of its grandmother. By the alleged negligence of the railway company the child was severely injured and its grandmother killed. The jury, in answer to questions put to them by the learned trial judge, Martin, B., found the defendants were guilty of negligence, also the grandmother of the child was guilty of negligence which contributed to the accident, and assessed the damages at £20. There was no negligence, nor was any suggested, on the part of the infant plaintiff. The judge on these findings directed a verdict to be entered for the plaintiff for the damages assessed, with leave to the defendants to move to enter a verdict for them or for a non-suit. Lord Campbell, in delivering the judgment of the Court of Queen's Bench on appeal, said: "In this case we think that the rule ought to be made absolute for entering a verdict for the defendants, or for a nonsuit. The jury must be taken to have found that Mrs. Park, the grandmother of the infant plaintiff, in whose care he was when the accident happened, was guilty of negligence without which the accident would not have happened; and that, notwithstanding the negligence of the defendants, if she had acted upon this occasion with ordinary caution and prudence, neither she herself nor the infant would have suffered. Under such circumstances, had she survived, she could not have maintained any action against the company; and we think that the infant is so identified with her that the action in his name cannot be maintained. The relation of master and servant certainly did not subsist between the grandchild and the grandmother; and she cannot, in any sense, be considered his agent; but we think that the defendants, in furnishing the ticket to the one and the half ticket for the other, did not incur a greater liability towards the grandchild than towards the grandmother, and that she, the contracting party, must be implied to have promised that ordinary care should be taken of the grandchild."

The judgment of the Court of Queen's Bench was sustained on appeal in the Court of Exchequer Chamber. Most of the

judges on appeal put the case on the ground, that it was not a mere case of simple wrong, but one arising from the contract of the grandmother, on the part of the plaintiff, that the child was to be conveyed subject to due and proper care on the part of the person having it in charge. Williams, J., however, did not rely merely upon an implied contract, but emphatically laid down the rule, that the person who had the charge of the child was identified with it, illustrating his view of the case in the following terms: "If a father drives a carriage in which his infant child is, in such a way that it incurs an accident which by the exercise of reasonable care he might have avoided, it would be strange to say, that, though he himself could not maintain an action, his child could."

The doctrine has been received with disfavour in many of the States in the American Union. Fully one-half of the American Courts have repudiated it altogether. In the State of New Jersey, in 1890, it was held, in the case of *Newman* v. *Phillipsburg Horse Car Ry. Co.*, that the negligence of the sister could not be imputed to an infant so as to defeat the right of action arising from the negligence of the company when the plaintiff, a child of two years, was in the custody of a sister of twenty-two and when, by the negligence of the latter, the child got on the track of the defendant company and was run over by a horse car, the driver at the time being occupied with the collection of tickets.

The rule of imputed negligence, as laid down in English cases, does not extend beyond the class of cases, in which the parent or custodian is actually present and exercising control over the movements of the child.

In some of the States of the Union, however, the doctrine has been carried to the extent of preventing the recovery of damages by an infant for injury sustained by the negligence of a third party, on the ground of the imputed negligence of the parent or custodian of the infant in allowing it to go on the street unattended. Such was the decision of the Court of Massachusetts, in 1862, in *Wright* v. *Malden and Melrose Railroad Co.*, 4 Allen,

p. 283. A child two years old, passing unattended across Sudbury Street, Boston, was run over by a car of the defendant company, whereby his leg was broken and other injuries sustained, from the effects of which he subsequently died. An action of tort was brought to recover damages for said injuries to the plaintiff's intestate. The ground of alleged negligence on the part of the company was, that the car, when the accident occurred, was being driven at a rate of speed unauthorized by law. On behalf of the company it was contended, the negligence of a parent in permitting a child of so tender an age to go on a public street unattended was imputed to the child as its negligence and under the rule such contributory negligence as would debar the right of recovery. Under the direction of the trial judge the jury returned a verdict for plaintiff. Exceptions having been filed to the judge's charge, Mr. Justice Hoar, in delivering the judgment of the Court on appeal, defined the law in these words: "We think the fact that a child of two years old in passing unattended across a public street, in a city traversed by a horse railroad, is in and of itself, necessarily, prima facie evidence of neglect in those who have it in charge. But in and of itself, standing alone, unexplained and unaccounted for, it is sufficient to authorize a jury to find that the child was not properly taken care of, and to entitle the defendants to a verdict."

The rule in the State of New York is as broad as that laid down in Massachusetts. Mason, J., in *Mangam* v. *Brooklyn Railroad Co.*, 38 N.Y., pp. 455, 459, says: "This rule applies to infants, in their relations to society, who are of such tender age that they are incapable of self-control and personal protection. An infant in its first years is not sui juris. It belongs to another to whom discretion in the care of its person is exclusively confided. The custody of the infant of tender years is confided by law to its parents, or those standing in loco parentis; and not having that discretion necessary for personal protection, the parent is held, in law, to exercise it for him, and in cases of personal injuries received from the negligence of others the law imputes to the infant the negligence of the parent. The infant

being non sui juris, and having a keeper, in law, to whose discretion in the care of his person he is confided, his acts, as regards third persons, must be held, in law, the acts of the infant; his negligence, the negligence of the infant."

Under the rule both in New York and Massachusetts great difficulty has arisen in defining the age at which a child becomes subject to the rule of imputed negligence, and also in defining the age at which it will be deemed negligence on the part of a parent to suffer the child to go abroad unattended or attended only by a very young person. It seems to be a mixed question of law and fact, and as a consequence great diversity of opinion exists as to the limit.

In *Robinson* v. *Cone*, 22 Vermont, p. 213, the Court held a directly opposite view in these words: "We are satisfied that, although a child or idiot or lunatic may to some extent have escaped into the highway, through the fault or negligence of his keeper, and so be improperly there, yet if he is hurt by the negligence of the defendant, he is not precluded from his redress. If one know that such a person is on the highway, or on a railway, he is bound to a proportionate degree of watchfulness, and what would be but ordinary neglect in regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger."

In some of the States of the Union a distinction is drawn between a case, brought by the parent to recover damages for the technical loss of service of the child, and an action brought by the child to recover damages, in its own behalf, for injuries sustained by the negligence of defendant. The distinction between the two cases is illustrated in two Ohio decisions. A child brought an action in its own behalf for injuries sustained, and the Court held, that the father's contributory negligence was no defence. The father brought another action for the same injuries to recover for loss of service, and the same Court held his contributory negligence to be a complete answer. See *Bellefontaine Ry. Co.* v. *Snyder, Jr.*, 18 Ohio 399 and *Bellefontaine Ry. Co.* v. *Snyder, Sr.*, 18 Ohio 670.

Sir Frederick Pollock holds, that in the case of a child not old enough to use ordinary care for its own safety, which from negligence on the part of its custodian is allowed to wander alone to a place of danger, the antecedent neglect of the one charged with its care makes no difference as to the legal result. He inclines to the view, that the defendant's duty is measured by his notice of special risk and his means of avoiding it. (1) defendant is liable, if so negligent, that an adult in the plaintiff's position could not have saved himself by reasonable care. (2) he is liable, if he is aware of plaintiff's helplessness, and fails to use such special precaution as is reasonably possible. He is not liable: (1) if he did not know, and could not with ordinary diligence have known, the plaintiff to be incapable of taking care of himself, and has used such diligence as would be sufficient towards an adult. (2 he is not liable if, being aware of the danger, he did use such additional caution as he reasonably could. (3) he is not liable if the facts were such that no additional caution was practicable, and there is no evidence of negligence according to the ordinary standard.

While there is no English case in which the negligence of the parent, in allowing a child to go unattended upon a public street or in a place of danger, has been imputed to the negligence of the child as such contributory negligence as would disentitle it to recover for injuries sustained through the negligence of a third party, the point was taken, in Scotland, in 1887, in *Martin* v. *Ward*, 14 Rettie 814. In this case two children, aged three and five respectively, were run over, the driver being negligent. In an action by the father it was contended, that his negligence contributed to the accident by allowing such young children to be in a place of danger without some one in charge of them. This was held to be no defence.

Mr. Beven inclines to the view, that in principle there is no reason why the child should be disentitled to recover for injuries sustained by the negligence of defendant, by reason of the parent's negligence in placing it or permitting it to be, in a position in whch it has sustained injury. He is of the further opin-

ion, that the reason why the point has not been taken directly, in any English case, arises from the fact that probably juries have taken the matter into their own hands in cases where the defendant has been negligent, and negatived the issue of contributory negligence.

SILAS ALWARD.

ST. JOHN, N.B.

THE RAYNER AND THAW TRIALS.

The trial of Horace George Rayner for the murder of Mr. Whiteley ended yesterday in the conviction of the prisoner, who was thereupon sentenced to death. The issue was simple, the case for the prosecution irresistible. The murder was committed in open day before more than one person, and the circumstances attending the crime were described with precision by eye-witnesses. The stories circulated as to the relationship between the prisoner and his victim were, to say the least, most doubtful. He was stated by his aunt not to be the son of Mr. Whiteley or in any way related to him. If her evidence was true the statement in the paper found on the prisoner, "William Whiteley is my father, and has brought upon himself and me a double fatality by reason of his refusals made personally," was a piece of clap-trap and a fiction, except so far as it admitted in effect an attempt to blackmail. The evidence of his aunt was that he was born in 1879, his mother being Emily Turner, a single woman, who was then living with a man named Rayner, and his birth was registered in the name of Rayner. The sister Louisa became afterwards Mr. Whiteley's mistress; and no doubt he came to know the other sister, but not, it was said, until the accused was four or five years old. It is true that the cross-examination of the counsel for the defence tended to throw doubts on the accuracy of some points in the witness's evidence. At all events, the trial revealed a disagreeable episode in the past life of Mr. Whiteley, but one which, if the prisoner's own ac-

count of it were correct, did not materially affect the character of the crime.

The one real question in the case was whether Rayner was insane at the time when he fired the shots. Insanity was the sole defence set up, and there was, as the Lord Chief Justice ruled, not a particle of evidence to support it. That Rayner was in desperate straits, that he had led a shiftless life and was at the end of his resources, that he was in perplexity how to live from day to day is true. His counsel spoke of him as a degenerate, and there was a suggestion that his mother, grandmother, and great-grandfather were of drunken habits. He was, it would seem, of no great capacity; and it is not improbable that he brooded much over the relationship of his aunt to Mr. Whiteley. But there can be no doubt that he went to Westbourne-grove with the deliberate intention—if he did not get money—of shooting Mr. Whiteley and of bringing about, to quote from the paper found upon him. "a double fatality." Neither lawyers nor doctors are in these days so confident as they once were as to the test of insanity. The subject is seen to be much more complex and obscure than it appeared to the judges who formulated the famous rule as to responsibility in *McNaughten's Case*. Psychologists and experts in mental diseases tell us that it assumes many forms; that in some the knowledge of right and wrong is dimmed, that in others the will is enfeebled; that some ideas possess so much influence that the subject of an overmastering obsession is powerless to resist, and that he is swept along to some crisis in which he is really passive. There was yesterday no such complex or obscure case before the jury. They were assured by doctors who examined him that he was not insane; and they had to judge of the conduct of one who, at war with extreme poverty, thought as a last resource to go to a well-known man of wealth and by threats of exposure of a scandal in his past life extort from him a sum of money. Rayner was prepared, if he met with a refusal, to shoot both Whiteley and himself. We get into a world of phantasy and break

away from elementary distinctions if we treat such conduct as necessarily indicative of insanity. Raynor was insane only in the sense in which those who mean to have money at all costs are insane. Fortunately English juries still cling to some simple fundamental ideas on this question, and English counsel have not learned, or disdain, the art of obscuring them.

The trial, one cannot help remarking, presents a remarkable contrast with that which has for weeks been going on in New York. The subject matter of the two inquiries has not a few points of strong resemblance. In both the affairs of a millionaire come before a jury. In both there is a question as to the relations of men of wealth and position with certain women. In both there was an opportunity for the Yellow Press of the two countries to publish or insinuate scandalous tales about the antecedents of the two dead men. In the inquiry at the Old Bailey, and to all appearance in that going on in New York, the sole question to be determined was the state of mind of the accused. The circumstances of the crimes and the question for the juries were curiously similar. The contrast between the procedure in the two trials could not be greater. The long nightmare of the Thaw trial still goes on, and the end is still indefinitely distant. It began as far back as January 23. Days were occupied in impanelling the jury, and the amount of time spent in heated combats between counsel about immaterial points passes comprehension. The trial of Rayner for much the same offence as that with which Thaw is charged is completed in a short day of about five hours. Even if Rayner had been wealthy, and if we can conceive medical evidence called on his behalf, the trial could not have been protracted beyond a second day. An eminent American lawyer has lately said, with respect to the administration of criminal justice in his own country, "The machine has become unworkable." We should not have ventured to use so strong a phrase. But the facts of the Thaw trial and the contrast which we have drawn suggest that this judgment, though harsh, may

be true. We may be thankful that so far we have small experience of trials which are almost as mischievious to society as the crimes which are investigated.—*Times.*

We feel like apologizing for devoting any space to the trial which, with its disgusting details and its hysterical surroundings, has delighted the modern daily press which increasingly grows lower in tone, more and more "yellow," and more and more panders to that which makes for evil rather than for good in the community. But as the trial of the murderer of Stanford White has some points of interest from a legal aspect, we shall be expected to refer to it, especially as the trial of the murderer of William Whiteley in England took place during the long drawn out continuance of the Thaw trial and under circumstances in many respects very similar. The difference in the conduct of these trials is commented on in an article which will be found in another place copied from the columns of *The Times.* As to the mode of conducting the administration of criminal justice in the United States case, we are glad to be able to speak favourably as to the manner in which Judge Fitzgerald discharged duties always difficult in such serious cases and under the practice in that country, but rendered doubly difficult by the (to us in England and Canada) unheard of methods of the counsel engaged—we refer here especially to the leading counsel for the defence, whose "wild and whirling words" would in British Courts of justice provoke derision or disgust; and would probably, to quote a comment from an English journal, "call forth an indignant remonstrance from the prisoner himself."

A somewhat singular point recently came up for decision in the Appellate Division of the Supreme Court of New York. One Peter McCullough died in that city and his loving nephew, having a due regard to the time honoured institution of the

country from which he came, provided refreshments in honour of his deceased uncle to the amount of $71.25. There was, in fact, an old fashioned "wake." The bill was sent to the executors of the deceased who refused to pay it. The judge before whom the matter came considered the claim an improper one and threw it out. The Appellate Division of the Supreme Court, however, reversed this decision, one member of the Court dissenting. This judge, who seems to have been a plain matter of fact man, devoid of sentiment, urged that the executors should not be called upon to supply provisions, liquors and cigars at funerals, and that refreshments on such an occasion were not the right either of the friends or relatives of the departed. The list of articles supplied to these weeping mourners included:—'Scotch, Irish and rye whiskey, port and sherry wines, soda water, cigars, ham, corned beef, steak, eggs, butter, potatoes, bread, rolls, cake, etc. The majority of the Court evidently took a lofty view of the solemnity of the occasion and held that "the word 'funeral' embraces not only the solemnization of interment, but the ceremonies and accompaniments attending — ceremonies prompted by affection—determined by the religious faith and sentiment of the friends of the deceased, and varying from the simple bier to the imposing catafalque; from the informal liturgical services or scriptural reading for the humble, to the elaborate services attending the obsequies of the renowned."

Lord Justice Davey. Baron Davey, of Fernhurst, died last month in his 74th year. He was called to the Bar in 1861, taking silk in 1875. In 1886 he was appointed Solicitor-General by Mr. Gladstone; and in 1893 went on the Bench as Lord Justice of Appeal. The English Bench has, in Lord Davey, lost one of its most learned members. He was a success both at the Bar and as a judge. As said in the English *Law Times*:—"His arguments at the Bar were appeals to reason and learning alone, and his judgments from the Bench were always marked by quiet dignity and logical expression."

REVIEW OF CURRENT ENGLISH CASES.

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SHIP—SALVAGE AGREEMENT—PRINCIPAL AND AGENT—MASTER.

The Crusader (1907) P. 15 is a somewhat curious case. The defendants were owners of a ship which ran aground in the Maldives. The plaintiffs were their agents at Colombo, and at the request of the master sent a tug from Colombo to the ship to tug her off, under an arrangement whereby the tug was to be paid charges amounting altogether to £60 a day. A clerk of the plaintiffs went on the tug, when the master, who was firmly of the opinion that the ship could not be got off, refused to accept the services of the tug, except on a "no cure no pay" agreement and ultimately the master signed a letter agreeing to pay the plaintiffs £4,000 provided the vessel was got off, which was assented to by the plaintiffs' clerk, but without any instructions from them. After about 4 days' work the ship was hauled off by the tug. On the defendants being subsequently informed of the agreement to pay £4,000 they refused to ratify it. The plaintiffs claimed £4,000, or in the alternative, such an amount of salvage as to the Court might seem just. Barnes P.P.D., held that they were entitled to neither, and that the defendants were entitled to insist on the arrangement made by the plaintiffs for the hiring of the tug being carried out, and that the plaintiffs were therefore only entitled to recover what they had paid on the basis of that agreement together with any other proper disbursements and a commission on their disbursements for their own services, their commission being fixed at 5 per cent. on the amount disbursed by the plaintiffs.

SHIP—MORTGAGE OF SHIP WITH POLICIES OF INSURANCE THEREON —AVERAGE LOSS — REPAIRS BY MORTGAGOR — MORTGAGEE'S RIGHT TO INSURANCE MONEYS—MORTGAGEE NOT LIABLE TO EXPEND INSURANCE MONEY IN REPAIRS—ASSIGNMENT BY MORTGAGOR.

Swan v. *Maritime Insurance Co.* (1907) 1 K.B. 116 disposes of two or three questions of interest. The owners of a ship mortgaged it together with a certain subsisting policy of insurance thereon. The ship suffered a particular average loss within the policy; so that there became payable under the policy in respect of general average loss £121 4s. 3d. and for salvage loss £94 3s.

11d. The mortgagor had the vessel repaired by Cleland Co. and assigned to that company any claim they were entitled to under the policy. In the meantime a firm of Holman & Sons, as agents, for the mortgagor had paid the amount of the salvage award. After the assignment to Cleland, Holman & Sons applied to the insurance company and obtained payment of the £94 3s. 11d. payable in respect of salvage loss. The right of Holman & Sons to this money was disputed by Cleland and the right to the £121 4s. 3d. was contested by the mortgagee and the trustee in bankruptcy of the mortgagor. Channel, J., who tried the action held that the mortgage being in default for a sum exceeding the amount payable for the general average loss, the mortgagee was entitled to the whole of the amount payable for that loss and was not under any liability to apply any part of it for repairs, and as between Cleland and Holman & Sons that the prior assignment to Cleland of which the insurance company was duly notified entitled Cleland to the £94 3s. 11d. and that the insurance company having paid the money to the wrong hand was liable to pay it over again.

INFERIOR COURT—PROHIBITION—ALTERNATIVE REMEDY BY MOTION TO SET ASIDE PROCEEDINGS.

In *Channel Coaling Co.* v. *Ross* (1907) 1 K.B. 145 the Divisional Court (Lord Alverstone, C.J., and Darling, J.), granted a prohibition to a County Court against further proceedings in an action founded on an alleged breach of contract within the district, where the defendant being resident in Scotland, the County Court judge had (contrary to the County Court Rules) made an order for service of the defendant in Scotland; the Divisional Court holding that the fact that the defendant had an alternative remedy, by motion to the County Court judge to set aside his order, was no ground for withholding the prohibition.

SOLICITOR AND CLIENT—DELIVERY OF UNSIGNED BILLS—BILLS AGREED TO BY CLIENT—CARRYING AMOUNT OF BILLS INTO CASH ACCOUNT—MORTGAGE BY CLIENT FOR ADMITTED BALANCE AND COVENANT TO PAY—SPECIAL CIRCUMSTANCES—TRUSTEE IN BANKRUPTCY—TAXATION OF COSTS.

In re Van Laun (1907) 1 K.B. 155 was an appeal by a solicitor from the rejection of his proof against the estate of his

client who was bankrupt. The solicitor had from time to time delivered unsigned bills to his client who after examination had signed "I agree this account." On the third occasion the client gave the solicitor a mortgage with a covenant for payment to secure the balance admitted to be due. More than twelve months afterwards the client became bankrupt, and the solicitor filed a claim for the principal and interest due under the covenant in the mortgage less the value of the security, and he also claimed to prove for the same principal sum on an account stated. The trustee rejected the proof and claimed the right to satisfactory evidence that the claim for costs represented a genuine debt. Bigham, J., while conceding that as between the solicitor and client it was competent for the client to waive the delivery of a signed bill and to agree to the amount claimed, and that what had taken place would be binding as against the client, and that there were no special circumstances shewn which would entitle the client to a delivery of a bill or to a taxation, yet considered that the trustee as representing the general body of creditors was entitled to go behind the mortgage and require satisfactory evidence that the claim for costs represented a genuine debt.

FOREIGN JUDGMENT—PARTNERSHIP—COLONIAL FIRM—PARTNER RESIDENT IN ENGLAND—AGREEMENT TO SUBMIT TO FOREIGN JURISDICTION—JUDGMENT BY DEFAULT.

Emanuel v. *Symon* (1907) 1 K.B. 235 was an action on a judgment obtained in Australia by default against the defendant then residing in England. The defendant contended he was not subject to the jurisdiction of the Australian Court, and that the judgment was not binding upon him. The facts were, that the defendant while residing in Australia in 1895 entered into partnership with the plaintiffs for working a gold mine owned by the partnership in Australia. In 1899 he left Australia and went to reside in England. In 1901 the plaintiffs commenced an action in the Supreme Court of Western Australia where the mine was situate for the dissolution and winding up of the partnership. The defendant was personally served with the writ in England, but entered no appearance. The action proceeded against him by default, and in the result a balance was found due by him to the plaintiffs which by the judgment of the Australian Court he was ordered to pay, and to enforce which judgment the present action was brought. Chan-

nell, J., who tried the action held that the defendant by entering into the partnership relating to real estate in Australia, had impliedly agreed to submit to the jurisdiction of the Colonial Court as to disputes arising during or on the termination of the partnership, and was therefore bound by the judgment.

SHIP—BILL OF LADING—DURATION—LIMITATION OF LIABILITY IN BILL OF LADING NULLIFIED BY DEVIATION.

Thorley v. *Orchis SS. Co.* (1907) 1 K.B. 243 emphasizes an important point of mercantile law, namely: That all clauses in a bill of lading limiting the liability of the ship owner are nullified in the event of the ship deviating from her contemplated voyage. This at first sight seems a somewhat harsh and almost unreasonable rule, but as Channell, J., says, if the principle on which it proceeds is that by deviation the merchant is deprived of the benefit of the insurance he effects on his goods, then that is a practical point which indicates that here may be a very good reason for the rule.

TREASURY NOTE OF FOREIGN GOVERNMENT PAYABLE TO BEARER—NEGOTIABLE INSTRUMENT—PROMISSORY NOTE.

Speyer v. *Commissioners of Inland Revenue* (1907) 1 K.B. 246 although a revenue case deserves a passing notice. A foreign government issued a series of instruments called "gold coupon treasury notes" each contained a promise to pay the amount of the note in gold to the bearer in two years from date, and coupons were attached for payment of the interest on the note abroad or in England at the option of the bearer. The notes were redeemable at par at the option of the issuing government upon their giving sixty days' notice: the notes gave no security to the holder beyond the promise to pay, and they were marketable, though not readily salable, on the London Stock Exchange. The question was whether the instruments were promissory notes, or whether they were "a marketable security." The Court of Appeal (Collins, M.R., and Cozens-Hardy and Farwell, L.JJ.) held that they were both promissory notes and "marketable securities" and that to constitute a marketable security it is not necessary that the instrument should afford security by way of hypothecation or otherwise for the money payable thereunder.

PEERAGE—SURRENDER OF PEERAGE TO SOVEREIGN—GRANT OF SURRENDERED PEERAGE.

Earldom of Norfolk (1907) A.C. 10 may be briefly noticed as of interest from a constitutional point of view. It is a decision of the committee of privileges of the House of Lords to the effect that a peerage cannot be surrendered. The claimant in the present case claimed that the Earldom of Norfolk had been surrendered in 1302 to Edward I., and that in 1312 Edward III. regranted the earldom to one Thomas de Brotherton through whom the claimant derived title. The committee resolved that both the surrender of 1302 and the regrant of 1312 were invalid.

CONTRACT OF RE-INSURANCE—IMPORTATION OF CLAUSES FROM ORIGINAL POLICY INTO CONTRACT FOR RE-INSURANCE—UNREASONABLE CLAUSE.

Home Insurance Co. v. *Victoria-Montreal Life Insurance Co.* (1907) A.C. 59. This was an appeal from the Supreme Court of Canada. The action was brought on a policy of re-insurance. The re-insurance was effected by attaching to the ordinary printed form of policy a typewritten slip or rider containing the special terms of the re-insurance. The printed form was altered by the insertion of the syllable "re" before "insure" and in other respects was in the usual form of a policy of insurance and included inter alia a clause, "No suit or action on this policy for the recovery of any claim shall be sustainable in any Court of law or equity until after full compliance by the insured with all the foregoing requirements nor unless commenced within twelve months next after the fire." The action was not brought within the time limited, and the defendants set this up as a bar to the action. The judge at the trial held that the limitation clause was inapplicable to re-insurance and the Court of Review unanimously affirmed that decision; but the Supreme Court of Canada, by a majority of three to two, reversed this judgment. The majority holding that the clause being de facto a part of the contract, the question of its inapplicability, or the fact that it produced results which the parties had not contemplated was their misfortune, but they were none the less bound by the express terms of the contract to which they had agreed. Their Lordships of the Judicial Committee of the Privy Council (Lords Macnaghten, Dunedin, and Atkinson and Sir A. Wilson and Sir A. Wills), agreed with the judge at the trial,

and the Court of Review, and came to the conclusion that, according to the true construction of the instrument, "so awkwardly patched and so carelessly put together," the condition in question was not to be regarded as applying to the contract of re-insurance. To hold otherwise in their opinion would be to adhere to the letter without paying due attention to the spirit and intention of the contract.

POWER OF DOMINION PARLIAMENT—B. N. A. ACT. 1867, s. 92 (13)—4 EDW. VII. c. 31(D).

Grand Trunk Ry. v. *Attorney-General of Canada* (1907) A. C. 65. This was an appeal from the Supreme Court of Canada touching the validity of 4 Edw. VII. c. 31, s. 1(D). This statute provides in effect that it shall not be possible for railways to contract themselves out of the liability to be sued by their employees for damages for personal injuries sustained in the course of their employment. The Supreme Court of Canada upheld the validity of the Act, and the Judicial Committee of the Privy Council (Lords Macnaghten, Dunedin, and Atkinson, and Sir A. Wilson and Sir A. Wills) have affirmed the decision. The validity of the Act was contested on the ground that it was not legislation touching railways, but was legislation concerning civil rights and was therefore ultra vires of the Dominion Parliament. But the Judicial Committee rather cruelly cite the appellants' own factum which claimed that such legislation would prove very injurious to the proper maintenance and operation of the railway and would tend to negligence on the part of the employees and injurious results to the public as being really a conclusive argument against the appellants and as shewing that the legislation was properly ancillary to railway legislation.

SEPARATE SCHOOLS ACT (R.S.O. c. 294) s. 36—QUALIFIED TEACHERS—EXEMPTION OF TEACHERS FROM EXAMINATION.

Brothers of the Christian Schools v. *Minister of Education* (1907) A.C. 69. This is the case which was known in the Court below as *Grattan* v. *Ottawa*, 8 O.L.R. 135; 9 O.L.R. 433, and the question at issue was whether the members of certain Roman Catholic orders known as the Christian Brothers and the Grey Nuns were eligible for employment as teachers in the public separate schools of Ontario without first obtaining certificates

of qualification. The High Court and Court of Appeal for Ontario held, that according to the proper construction of the Separate School Act (R.S.O. 1897, c. 294) s. 36, the exemption of members of the communities in question from examination only applied to those who were members at the time of the passing of the B.N.A. Act, 1867, and not to any who subsequently became members; and this decision has now been affirmed by the Judicial Committee of the Privy Council (Lords Macnaghten, Dunedin and Atkinson and Sir A. Wilson and Sir A. Wills).

EXPROPRIATION OF LAND FOR PUBLIC PURPOSES—OCCUPANT HAVING ONLY POSSESSORY RIGHT—COMPENSATION.

Perry v. *Clissold* (1907) A.C. 73, was an appeal from the High Court of Australia which involves a simple point viz., whether a person without a paper title who is in actual occupation of land expropriated for public purposes is entitled to compensation. The evidence as to possession was that the occupant entered on the property when vacant, that he enclosed it with a substantial fence and held exclusive possession and paid the taxes for ten years. The possession was not sufficient to extinguish the claim of the rightful owner, but he was unknown and had made no claim. The Judicial Committee of the Privy Council (Lords Loreburn, L.C., Macnaghten, Halsbury, Davey, Robertson and Atkinson and Sir Ford North and Sir Arthur Wilson) agreed with the High Court that the occupant was entitled to compensation notwithstanding that under the Act which authorized expropriation the appellant not only acquired the right of the occupant but also that of the owner of the paper title.

AUSTRALIA CONSTITUTION ACT (63 & 64 VICT. C. 12)—POWER OF STATE LEGISLATURE TO IMPOSE TAX ON SALARY OF FEDERAL OFFICIAL.

In *Webb* v. *Outrim* (1907) A.C. 81 the Judicial Committee of the Privy Council (Lords Halsbury and Macnaghten and Sir A. Wilson and Sir A. Wills) reversed the judgment of the Supreme Court of Victoria. Contrary to the opinion of the Colonial Court their Lordships held that there is nothing in the Australian Constitution Act which prevents any of the Australian State Legislatures from imposing taxes on the salaries of officers of the Commonwealth. The contrary conclusion was arrived at in Ontario: see *Leprohon* v. *Ottawa*, 2 A.R. 522.

COURTS MARTIAL—SPECIAL LEAVE TO APPEAL.

In *Tilonko* v. *Attorney-General of Natal* (1907) A.C. 93 an application was made for special leave to appeal from the decision of a Court martial in Natal. The local legislature had passed an Act of indemnity expressly affirming all sentences passed by any Court martial and confirming all acts done thereby during the late war. In these circumstances the Judicial Committee of the Privy Council (Lords Halsbury, Macnaghten, Davey and Atkinson and Sir A. Wilson) held that no leave to appeal could possibly be given. Lord Halsbury points out that so-called "martial law" is really no law at all, and that any attempt to make military officers administering summary justice analogous to regular proceedings of Courts of justice is quite illusory. Such acts of justice are justified by necessity by the fact of actual war—and the committee held it had no power to inquire into the propriety of the Act of the legislature giving validity to the acts of the Court in question.

FIRE INSURANCE—NOTICE REQUIRED OF ADDITIONAL INSURANCE—PREMIUM FOR ADDITIONAL INSURANCE UNPAID.

Equitable Fire & Accident Office v. *Ching Wo Hong* (1907) A.C. 96. This was an appeal from the H.M. Supreme Court for China and Corea, and the point involved is a very simple one. A policy of insurance provided that it should become void if the insured effected additional insurance and omitted to give notice thereof to the insurers. The insured had applied for additional insurance in another company and a policy therefor had been issued but it contained a provision that the insurers were not to be liable thereon before the premium or deposit on account thereof was actually paid. No notice was given, but no premium had in fact been paid—there was, however, a receipt for the premium in the body of the policy and this with the delivery of the policy to the insured it was contended established that the insurers had given credit for the amount of the premium. The Court below held that the fact of the non-payment of the premium prevented the second policy taking effect and therefor that there was no breach of the condition as to further insurance, and the Judicial Committee of the Privy Council (Lords Macnaghten, Davey, Robertson and Atkinson) agreed with that conclusion, and dismissed the appeal.

LIABILITY OF DIRECTOR—OVERDRAFTS OF CUSTOMERS IMPROPERLY ALLOWED BY CASHIER OF BANK—FAILURE TO DETECT ERRORS IN AUDITED ACCOUNTS—NEGLIGENCE.

Prefontaine v. *Grenier* (1907) A.C. 101. This was an action by the shareholder of a bank against the president for alleged negligence in making reports concerning the affairs of the bank which contained misrepresentations, relying on which the plaintiff purchased shares. One alleged misrepresentation was the statement that the bank had a reserve fund of $600,000, but although the report did allege that there was a reserve to that amount, it did not suggest or allege that there was any specific assets representing that fund, and the statement was held to mean only that it was an estimated amount and not that it had any separate or specific existence as a separate and distinct investment. Certain overdrafts by customers which had been improperly allowed by the cashier were included under the head of "Loans and discounts current" whereas the plaintiff contended they should have been included in the item "Notes and bills overdue" but the plaintiff's claim based on that alleged misrepresentation was held to be untenable. The overdrafts above referred to had caused the collapse of the bank and the plaintiff charged the defendant with negligence in permitting such overdrafts, and not exercising proper control. But as to this it was held that as the cashier was the principal executive officer of the bank and there was no reason for the defendant to suspect either his ability or good faith, and, the accounts of the bank were from time to time audited by independent auditors, and correctly shewed the total assets and liabilities, but were so made up as to conceal the existence of the improper overdrafts; this was sufficient to exonerate the defendant. Another charge of negligence was based on the evidence of an inspector of the bank who testified that in the course of his duty he had discovered some irregularities and had suggested that he should be authorized to make a complete inspection, but that the defendant rejected the idea that the inspector should be authorized to supervise the work of the head official of the bank. But it was held that it was not negligence to sanction a system of inspection inconsistent with the ordinary method of conducting the affairs of the bank, and especially as it was not shewn that there was any connection between the matters excepted to by the inspector and the fatal overdrafts. The Judicial Committee of the Privy Council (Lords Macnaghten, Davey, Robertson and Atkinson)

agreed with the Court of King's Bench (Que.), and dismissed the appeal, which goes to shew that the principal security of shareholders must be in the capacity and honesty of the chief executive officer, and not in the president and directors.

SUPREME COURT ACT (1906) S. 59—IMPERIAL COLONIAL COURTS OF ADMIRALTY ACT (1890) S. 6—RIGHT OF APPEAL IN ADMIRALTY CASES.

Richelieu & Ontario Navigation Co. v. *Cape Breton* (1907) A.C. 112. In this case the Judicial Committee of the Privy Council (Lords Macnaghten, Davey, Robertson and Atkinson and Barnes, P.P.D., with nautical assessors, Admiral Lloyd and Capt. Coborne, affirmed a judgment of the Supreme Court of Canada, but the case is reported apparently principally for the decision of the committee on a preliminary point taken by the respondents that no appeal would lie from the Supreme Court of Canada without special leave and no such leave had been obtained. The respondents relied on what is now s. 59 of the Supreme Court Act. The appellants on the other hand relied on the Imperial Colonial Courts of Admiralty Act, 1890, s. 6, which provides that the appeal from a judgment of any Court in a British possession in the exercise of the jurisdiction conferred by that Act either where there is, as of right no local appeal, or after a decision on local appeal, "lie, to Her Majesty the Queen-in-Council" and by s. 15 the expression "local appeal" means "an appeal to any Court inferior to Her Majesty-in-Council," and their lordships held that this enactment overrode the provision of the Supreme Court Act and that the appellants had an appeal as of right to the King-in-Council from the decision of the Supreme Court.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] SAUNDERS *v.* THE KING. [March 13.

Criminal law—Disorderly house—Common betting house—Betting booth—Race course of incorporated association.

A perambulating booth used on the race course of an incorporated racing association for the purpose of making bets is an "office" or "place" used for betting between persons resorting thereto as defined in s. 197 of Crim. Code, 1892 (Crim. Code, 1906, s. 227).

Sub-s. 2 of s. 204 of the former Code (now s. 235) which exempts from the provisions of the main section (dealing with the recording or registering of bets) bets made on the race course of an incorporated association does not apply to the offence of keeping a common betting house. DAVIES, J., dissenting.

Judgment of the Court of Appeal (12 O.L.R. 615) affirmed, DAVIES, J., dissenting. Appeal dismissed with costs.

Ritchie, K.C., and *Godfrey*, for appellant. *Cartwright*, K.C., for respondent.

N.B.] IN RE RICHARD. [March 21.

Canada Temperance Act — Conviction — "Criminal case"—Habeas corpus—Penalty "not less than $50"*—Conviction for* $200.

A commitment on conviction for an offence against Part II. of the Canada Temperance Act is a commitment in a criminal case under s. 32 of R.S.C. s. 135 (R.S. 1906, c. 139, s. 62) which gives a judge of the Supreme Court of Canada power to issue a writ of habeas corpus.

By 4 Edw. VII. c. 41 (R.S. 1906, c. 152, s. 127) for a first offence against Part II. of the Canada Temperance Act a fine

may be imposed of "not less than $50" and for a second offence of "not less than $100."

Held, that for a first offence the justices cannot impose a fine of more than $50. MACLENNAN, J., dissenting.

On application to a judge for a writ of habeas corpus he may refer the same to the Court which has jurisdiction to hear and dispose of it. IDINGTON and MACLENNAN, JJ., dissenting. Prisoner discharged.

Masters, K.C., and *C. L. Hanington*, for application. *J. A. Ritchie*, contra.

Province of Ontario.

COURT OF APPEAL.

From Teetzel and Anglin, JJ.] [Feb. 26.

IN RE PORT ARTHUR AND RAINY RIVER ELECTION.
PRESTON *v.* KENNEDY.

Provincial Election—Voters' list—Finality of—Scrutiny.

Held, affirming the decision of the rota judges that, upon a scrutiny, the voters' lists are final and conclusive evidence of the right of the persons named therein to vote; and no enquiry can be then entered into respecting the votes of persons on the lists, as, for example, that the voters were aliens or under age. Such questions of fact are, under Ontario Voters' Lists Act, R.S.O. 1907, c. 7, to be tried and determined before the voters' list is finally settled, revised, and transmitted. The only exceptions are those mentioned in s. 24 of the Act.

Mowat, K.C., for appellants. *Hellmuth*, K.C., and *W. J. Elliott*, for respondent.

HIGH COURT OF JUSTICE.

Anglin, J.] [Jan. 4.

VANO *v.* CANADIAN COLOURED COTTON CO.

Discovery—Next friend of infant plaintiff—Right to examine.

The next friend of an infant plaintiff is not "a party to the action or issue, whether plaintiff or defendant," under Con.

Rule 439; nor is he a person for whose immediate benefit an action is prosecuted or defended under Con Rule 440, being in the action merely for the protection of the infant's interests and with the object of guaranteeing the payment of the costs by him; and so he is not examinable for discovery.

The distinction between our rules and English Order XXXI., Rule 29, pointed out.

The order was made by a local judge ordering such examination was therefore set aside.

Counsell, for plaintiff. *C. W. Bell,* for defendant.

Mulock, C.J. Ex.D., Teetzel, J., Anglin, J.] [Jan. 25.

BAXTER *v.* GORDON IRONSIDES CO.

Malicious prosecution—Termination of proceedings favourable to plaintiff—Maintenance of action.

In order to maintain an action for malicious prosecution based upon proceedings in a criminal matter the plaintiff must shew that the termination of the proceedings taken against him was such as furnishes prima facie evidence that the action (proceedings) was without foundation. The plaintiff was charged with disposing of his property with intent to defraud his creditors, arrested and taken before a police magistrate where as the result of a suggestion he gave up $300 found on his person and signed notes for the balance of the defendants' claim and the prosecution was withdrawn and the police magistrate endorsed on the information "settled out of Court" and plaintiff was allowed to go.

Held, that he could not maintain an action for malicious prosecution.

Wilkinson v. *Howell* (1830), Moody & Malkin, 495, p. 496, followed. English and American cases reviewed. Judgment of BOYD, C., reversed.

H. L. Drayton, for defendants' appeal. *Middleton,* contra.

Cartwright, Master.] FALLIS *v.* WILSON. [March 11.

Attachments of debts—Police constable's pay—Service on treasurer—Payment to agent—Debt due—When—Payment in advance.

On a motion to make absolute an order attaching all debts due by a municipal corporation to the defendant, a police constable, which was issued on the 27th of February and served on the treasurer of the corporation at 3 o'clock in the afternoon of the same day, and it appeared the defendant's salary was $900 a year payable monthly at the end of each month.

Held, that although the defendant was not a servant of the corporation the treasurer was the proper person to serve.

Held, also, that the cheque for the defendant's pay for the month of February, which according to custom had been delivered to a messenger to leave at the police station for the defendant, but on service of the order had been stopped by telephone and brought back to the treasurer had not come into the hands of the defendant's agent before service of the order: But

Held, also, that there was no debt due (nothing debitum in praesenti) as the month's salary was not due until the end of the month and that there is no law which forbids an employer to pay servants in advance and the order was discharged but without costs.

B. N. Davis, for judgment creditor. *Phelan,* for judgment debtor. *Fraser,* for garnishee.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] SLATER *v.* RYAN. [Jan. 15.

Trade name—Imitation—Defendant using his own name.

Motion for injunction.

The plaintiff company had for some years carried on the manufacture and sale by wholesale, of boots and shoes, styled "Slater Shoes" or "Slater" boots and shoes, and advertised

extensively as such. The founder of the business was George T. Slater, after whose death the plaintiffs acquired the business and good will from the executors. They had obtained a specific trade mark consisting of a representation of a wooden slate frame, with the words "The Slater Shoe" inscribed on the slate, and their goods had a large sale in Winnipeg at a store where they were exclusively sold. The defendant, who carries on a retail boot and shoe business in Winnipeg, about September, 1904, took the agency for the sale of boots and shoes made by George A. Slater, another wholesale manufacturer, whose goods also were extensively advertised and sold in Canada as "The George A. Slater Shoe" and the "Invictus Shoe." The advertisement complained of appeared in a Winnipeg newspaper, on the 2nd and 3rd of April, 1906, and consisted of a cut of a shoe, underneath which in display type were the words "We sell the celebrated George A. Slater Invictus shoes for men." The words "George A." and "Invictus" were in considerably smaller type than the words "Slater" and "shoes" but still were quite prominent and easily seen, and the Court was satisfied that the insertion of the advertisement in that form, was by the defendant's advertising agent without his knowledge, and that the defendant discontinued the advertisement, as soon as the form of it came to his notice, and before plaintiffs took any exception to it.

This action was not commenced until April 19, 1906, the Court being asked to restrain the defendant from advertising or offering for sale or selling boots and shoes, not made by the plaintiffs as "Slater Shoes" or "Slater Goods," or by any other name or names under which the public might be led to believe that the shoes handled by the defendant, were made by the plaintiffs.

Held, that the defendant had a right to advertise and sell shoes under the name "George A. Slater," as that was the real name of his principals and there was nothing to shew that he had been doing so dishonestly, or in such a way as to falsely represent the goods as those of the plaintiffs, and that the injunction should be refused.

Burgess v. *Burgess*, 3 De G.M. & G. 896, followed. *Reddoway* v. *Banhour* (1896) A.C. 199 distinguished.

Hoskin, for plaintiffs. *Aikins*, K.C., and *Coyne*, for defendant.

Mathers, J.] TELLIER *v.* SCHILEMANS. [Jan. 31.

Administrator pendente lite—Court of King's Bench, jurisdiction of, over Surrogate Court matters—Referee's jurisdiction.

Held, 1. In Manitoba the power to appoint an administrator pendente lite is vested solely in the Court of King's Bench by virtue of the provisions of The King's Bench Act conferring upon it the jurisdiction of all the Superior Courts in England having cognizance of property and civil rights including the Court of Probate, also by virtue of the express enactment in s. 39 of The Surrogate Courts Act, R.S.M. 1902, c. 41.

2. By virtue of Rule 449 of The King's Bench Act, a judge in Chambers would have power to appoint such administrator.

3. Notwithstanding that the power to make such appointment is not one of the matters excepted, by Rule 27 the King's Bench Act, from the jurisdiction of the Referee in Chambers, the latter has no jurisdiction to make such appointment.

Appeal from refusal of the Referee to make such appointment dismissed with costs.

O'Connor, for plaintiff. *Haggart,* K.C., for defendants.

Mathers, J.] RE HUNTER. [Feb. 18.

Certiorari—When judge in Chambers may grant certiorari.

Held, that, when the Full Court is not sitting, a judge in Chambers has jurisdiction to direct the issue of a writ of certiorari to bring up the record of a conviction for a breach of a municipal by-law. Gude's Crown Practice, vol. 1 p. 216, and Short and Mellors Crown Office Practice, pp. 132 to 140, followed.

All further proceedings after the return to the writ must, however, be taken either before the Court of King's Bench in banc or the Court of Appeal.

Haffum, for applicant. *Macdonald,* K.C,, contra.

Mathers, J.] [Feb. 19.

CANADIAN PORT HURON CO. *v.* BURNETT.

Priority as between unregistered equitable charge and subsequent registered conveyance—Effect of grant of land by registered owner "according to his estate and interest therein and as fully and effectually as he lawfully can or may" to an assignee for the benefit of creditors.

The defendant Burnett, having purchased machinery from the plaintiffs on credit executed an agreement under seal giving a lien on certain farms therein described.

This agreement could not, under s. 4 of the Lien Notes Act, R.S.M. 1902, c. 99, be registered, but after default by Burnett the plaintiffs commenced their action to realize their claim out of the farms and registered a certificate of lis pendens against the farms in the proper land titles offices. A few days afterwards Burnett made an assignment for the benefit of his creditors to the defendant, which was duly registered. As regards Burnett's lands, the wording of the assignment was as follows: "The said debtor according to his estate and interest therein and as fully and effectually as he lawfully can or may . . . by these presents doth hereby grant . . . unto the said trustee . . . all the real estate, lands, tenements and hereditaments of the said debtor . . . of or to which he may have any estate, right, title or interest of any kind or description with the appurtenances."

Held, that such deed purported to deal only with such estate or interest in the land as the grantor then had and did not operate or assume to operate so as to convey the land free from the equitable charge or lien previously given to the plaintiffs.

Secs.6 and 7 of R.S.M. 1902, c. 8, do not help the assignee as the assignment is not in the words or to the like effect of the words given in s. 6, and s. 7 provides only that every assignment . . . shall vest the estate "thereby assigned" in the assignee, and does not assume to give the deed of assignment any larger effect in the way of passing property than on its face it purports to have.

The only interest, therefore, that passed to the assignee being what was left after the plaintiffs' equitable charge should be satisfied, neither The Registry Act nor he Lien Notes Act can have any application, as they only apply to invalidate

an unregistered instrument as against a registered instrument that effects the same estate or interest in lands. Judgment for plaintiffs with costs.

Hoskin, for plaintiffs. *Hudson,* for defendants.

Macdonald, J.] [Feb. 26.

MCLAREN *v.* MCMILLAN.

Contract — Rescission — Misrepresentation — Fraud—Right of some only of a number of joint contractors to rescind.

The plaintiffs and a number of other persons had been induced by an agent of the defendants to agree to take each one share in a horse valued at $3,000 and to sign two promissory notes for $1,500 each in payment for the horse. The plaintiffs complained that they had been induced to sign said notes by fraud and misrepresentation on the part of the defendant's agent, and one of the plaintiffs also claimed that he was too drunk at the time of signing the notes to know what he was doing, but the trial judge found against him on this point. The plaintiffs brought this action for a declaration that the notes were fraudulent and void and to have them delivered up to be cancelled and for an injunction to prevent the negotiating or dealing with the notes.

Held, that the plaintiffs were not in a position by themselves to rescind the contract as in fact a partnership had been formed in the making of the contract and all the partners were not asking for rescission. *Morrison* v. *Earls,* 5 O.R. 434, followed. The plaintiffs' only remedy would be by cross-action or counterclaim for damages, and they could not succeed in this action.

Noble and *Card,* for plaintiffs. *Barrett,* for defendants.

Macdonald, J.] [Feb. 26.

SMITH *v.* AMERICAN ABELL ENGINE CO.

Charge on land created by assignment separate from order for chattel—Caveat.

Section 4 of the Lien Notes Act, R.S.M. 1902, c. 99, forbids the registration, in any registry office or land titles office in Manitoba, of any lien notes, hire receipts, orders for chattels or documents on instruments containing as a portion thereof or

having annexed thereto or indorsed thereon any order, contract or agreement for the purchase or delivery of any chattel or chattels. It also forbids the filing or registration in any land titles office of any caveat which refers to or is founded upon any instrument or document, or part thereof, the registration of which is prohibited. And s. 7 of the Act declares that any instrument, the registration of which is prohibited by the Act, in so far as it purports to affect land, shall be absolutely null and void as against any person or corporation claiming an interest or estate in lands under a registered instrument. The plaintiff's predecessor in title to the lands in question had given an order to the defendants for a threshing outfit bought on credit, also a separate instrument creating a charge on the land for the price agreed on but not referring in any way to the order for the outfit. Defendants had promptly registered this latter instrument by way of caveat.

Held, that neither the instrument creating the charge nor the caveat founded thereon was within the prohibition of the statute, and that the lands in question were subject to the lien and charge created by the said instrument, as there is nothing in the Act to prevent security on land being taken separate and apart from the order under which the chattels are purchased. *Modell* v. *Thomas & Co.*, 1 Q.B.D. 230, distinguished.

Fullerton and *Blackwood*, for plaintiff. *Hudson*, for defendants.

Macdonald, J.] [Feb. 26.

J. J. CASE THRESHING MACHINE CO. *v.* WERMIGER.

Evidence—Estoppel—Note made payable to B. on sale made by A. of latter's goods.

One Kirkpatrick, having previously bought a threshing outfit from the plaintiffs upon which he still owed them a large amount, made a sale of it to the defendant. As a matter of convenience this sale was carried out by the defendant signing an order for the purchase and making a note for the amount in the name of the plaintiff company, and the defendant resisted payment of the note on the ground that the consideration for it had wholly or partly failed, and that he had not got all the goods ordered or an engine of the quality ordered. It was contended on his behalf that the documents relied on were con-

clusive evidence that the sale had been made by the plaintiffs and that they were estopped from denying it.

Held, that the plaintiffs were not estopped from shewing that it was Kirkpatrick who had made the sale and that, as the evidence established this, defendant had no remedy against the plaintiffs and must pay the amount of the note.

Henderson and *Matheson,* for plaintiffs. *Coldwell,* K.C., and *R. A. Clement,* for defendant.

Mathers, J.] GRANT *v.* REID. [March 8.

Statute of Frauds—Agreement of sale of land—Memorandum in writing—Costs.

Defendant, being informed by one McPhail that the plaintiffs would purchase the lot in question for $2,000, ascertained from the owner that he would sell it for $1,200. Defendant then, without making any bargain with the owner, went to McPhail and signed a document not under seal agreeing to sell the lot for $2,000 and acknowledging receipt of a cheque for $100 as deposit on same. This document did not mention the name of the purchaser or even McPhail's name, but it was McPhail's cheque for $100 that was given. McPhail had falsely represented to the plaintiffs that he had the lot for sale as agent of the owner, and the plaintiffs negotiated with McPhail on that basis. Afterwards the owner refused to sell the lot, and plaintiffs sued defendant on the document he had signed for specific performance or damages in lieu thereof.

Held, that, as McPhail was not the agent of the plaintiffs in the transaction, the case was not brought within *Pearce* v. *Gardner* (1897) 1 Q.B. 688, and his cheque was not sufficient to supply the omission of the purchaser's name from the agreement and the two documents did not together constitute a memorandum in writing sufficient to satisfy the Statute of Frauds. Action dismissed without costs, as defendant's conduct in agreeing to sell what he did not own had brought about the litigation.

Laidlaw and *St. John,* for plaintiffs. *Elliott* and *McNeill,* for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] [Jan. 21.

IKEZOYA *v.* CANADIAN PACIFIC RY. CO.

Appeal—Jurisdiction—Habeas corpus—56 *Geo. III. secs.* 3 *and* 4—*Order discharging prisoner—Dominion Immigration Act —Proclamation—Effect of—Appealability from decision of immigration officer—B.C. Stat.* 1904, *c.* 15, *s.* 85.

Plaintiffs were four Japanese passengers from Yokohama to Vancouver. On arrival at the latter port, they were inspected by the medical officer of the Immigration Department, who concluded that three of them were suffering from trachoma, but were permitted to land for treatment. After a certain time, the officer decided to deport them, three of them on account of the disease, and the fourth, a child of one of the others, on the ground that it might become a public charge owing to the condition of its eyes. The evidence of three medical practitioners was produced on the application to the effect that the plaintiffs were not then suffering from any contagious disease, and on this evidence MORRISON, J., ordered their release from custody. They then departed and at the time of the appeal their whereabouts was unknown. The Dominion Government appealed on the construction of the amendment to the Immigration Act in 1902, and the proclamation issued pursuant thereto, advancing the contention that the finding of the officer appointed by the Minister of the Interior was final and was not reviewable by the Court.

A proclamation was issued and published in the Canada Gazette empowering the Minister of the Interior, or any officer appointed by him for the purpose, in pursuance of the amendment to the Immigration Act, 1902, to prohibit the landing in Canada of any immigrant or other passenger suffering from any loathsome or infectious disease, and who, in the opinion of the Minister, or such officer, should be so prohibited.

Held, on appeal, affirming the order of MORRISON, J., that the statute and the proclamation issued thereunder, merely authorizes the deportation of the diseased person; that it does not take away the right of the Court to decide the question of fact on a proper application and the judges are bound to inquire

into the matter on an application for habeas corpus. Parliament not having made the examination by the immigration officer final, and as the statute contains no expression that a writ of habeas corpus shall not issue to examine into the causes of detention of a person detained under the statute, the power to do so remains with the Court.

Davis, K.C., for appellants. *Macdonell*, for respondents.

Full Court.] [Jan. 21.

COEN *v.* NEW WESTMINISTER SOUTHERN RY. CO.

Railway—Animal killed on track—"Not wrongfully on the railway"—Adjoining owners—Obligation to fence—Railway Act (Dom.) c. 29, 1888,—B.C. Stats. 1887, c. 36, 1889, c. 36.

Plaintiff's mare and colt strayed from his yard on to the public road, and reached the track of defendant company, presumably at a place called Morton's Crossing. The mare was overtaken by a train and killed as she was running towards the crossing. This was a farm crossing, which, under the statute, should have a gate on each side. There was no gate or fence on the west side of the crossing by which the animal was presumed to have reached the track from the public road, but there was a cattle guard (over which the animals crossed) put there by agreement with Morton. Plaintiff was not an adjoining owner.

Held, on appeal, MARTIN, J., dissenting, that Morton's Crossing being a farm, and not a public crossing, the statute required that it be either fenced off or provided with gates on both sides; and that the placing of the cattle guard did not relieve the company from its obligation to provide a fence or gate on the west side of the crossing.

Bowser, K.C., and *W. Myers Gray*, for appellant, plaintiff. *Reid*, for respondent, defendant.

Full Court.] [Jan. 21.

ELK LUMBER CO. *v.* CROW'S NEST PASS COAL CO.

Vendor and purchaser—Authority to contract—Option—Specific performance.

An officer of the defendant coal company, known as Land Commissioner, gave to defendant M. in June, 1900, the following

document: "Re Sale to you of Mill-Site. The Crow's Nest Pass Coal Company hereby agree to sell to you a piece of land at or near Hosmer Station on the Crow's Nest line, to contain at least one hundred acres of land, at the price of $5.00 per acre, payable as follows: When title issued to purchaser. Title to be given as soon as the company is in a position to do so. Purchaser to have possession at once. The land to be as near as possible as shewn on the annexed sketch plan."

M. for a nominal consideration, in October, 1902, assigned this document to B. who in turn assigned it for value to plaintiff company. In an action for specific performance of this agreement, plaintiff company was non-suited at the close of its case, and it was

Held, on appeal, that one of the conditions on which the document was given being that a mill should be built at an early date, the defendant M., not having done anything in that direction for two years, must be taken to have abandoned any such intention.

Per HUNTER, C.J.—It was for the company to shew that the intention to build a mill was a condition dans locum contractui, and the fact that the condition was not inserted in the agreement was sufficient to call upon the company to make good that defence.

Taylor, K.C., and *Ross,* K.C., for plaintiff company. *J. A. Macdonald,* K.C., and *Herchmer,* for defendants.

Full Court.] [Jan. 21.

PADULAROGA *v.* CANADIAN CANNING CO.

Shipping—Proximate cause of injury—Negligence—Collision with vessel at anchor.

A tug attached to a scow loaded with coal approached a bridge the piers of which were being repaired by a railway contractor. The fairway was partly obstructed by a scow connected with the work, but the captain of the tug, after viewing the situation, was of opinion he could get through. In doing so, he brushed slightly against the scow, at the further end of which, on a boom stick in the water, was the plaintiff, engaged in an endeavour to swing or push the scow further around and out of the way of the tug. Plaintiff was crushed against a pile by the scow and severely injured.

Held, reversing the decision of MORRISON, J., that the master of the tug was negligent in not stopping and then making certain that it was safe to proceed.

Lucas, for plaintiff, appellant. *J. A. Russell,* for respondent.

Full Court.] HAPLIN *v.* FOWLER. [Jan. 21.

Mining law—County Court—Jurisdiction—Working agreement, or lease—Use of timber on claim—Ore-bins and tramway.

Defendant by an agreement under seal, purported to lease to plaintiffs a portion of a quartz mine, the plaintiff covenanting inter alia to open and maintain in good repair 100 feet of No. 6 level from the mouth inwards, to remove all broken ore and to sort out and preserve for shipment such material as could be profitably sorted, to place all concentrating ore on the dump as directed by defendant, to work the demised area in a good and miner-like manner to the satisfaction of the defendant and to insure by means of timbering, etc., as required by defendant, the safety of the workings and their permanency. Defendant was to receive the returns from all ore shipped, first making certain deductions, to keep certain percentages from the amounts received, and pay the balance to plaintiff.

Held, that these provisions constituted a contract merely to win the ore for a sliding percentage of the returns.

Plaintiff claimed damages for being prevented by defendant from using the timber on the claim in his operations under the agreement, for tearing up and removing the ore track and trestle which were alleged to be the only means for working the ore, and also for preventing plaintiff from using certain ore-bins and a track in connection with same at the mouth of the level.

Held, that as the agreement was silent concerning the use of the timber, track, trestle and ore-bins, it should have been left to the jury to find whether there was a distinct collateral agreement concerning these matters, and if so, what it was.

New trial ordered, MARTIN, J., dissentiente.

W. A. Macdonald, K.C., for appellant. *Davis,* K.C., for respondent.

Book Reviews.

Notable Scottish Trials. Canada Law Book Co., 32 Toronto St., Toronto, 1907.

This interesting series commenced with the celebrated trial of Madeline Smith, followed by an account of the trial of the Glasgow Bank Directors already referred to. Since then we have received two volumes, the first of which tells of the trial of Dr. Pritchard for the murder of his wife, of which he was found guilty and subsequently executed. This trial brought up even more difficult points for adjudication than the Thaw case, the records of which have been and still are disgracing the public press, but the trial only occupied four days and within three weeks he had suffered the extreme penalty of the law.

We have in another volume the trial of Eugene Marie Chantrelle for the murder of his wife. This trial also lasted four days and resulted in the verdict of guilty. The material in these books is interesting in itself and well put together.

Falconbridge on the law of Banking, Bills, Notes and Cheques, Canada Law Book Co., 32 Toronto Street, Toronto. 1907.

Just received. Will be reviewed in our next issue.

Bench and Bar.

Hon. H. T. Taschereau, of the Superior Court of Quebec, to be Chief Justice of the King's Bench for that Province in the room of Hon. Sir Alex. Lacoste, Kt., resigned (January 29).

George Patterson, of New Glasgow, N.S., Barrister-at-law to be Judge of the County Court of Pictou and Cumberland in the room of His Honour W. A. D. Morse, deceased (January 26).

His Honour M. A. McHugh, Junior Judge of the County Court of the County of Essex to be Judge thereof in the room and stead of His Honour C. H. Horne, deceased (April 3).

E. P. Clement of the town of Berlin, Barrister-at law, to be Junior Judge of the County Court of the County of Essex in the room and stead of His Honour M. A. McHugh (April 3).

Canada Law Journal.

VOL. XLIII. MAY 1. NO. 9.

COLLATERAL OR CASUAL NEGLIGENCE.

LIABILITY OF A PRINCIPAL FOR THE NEGLIGENT ACTS OF A CONTRACTOR OR HIS SERVANTS.

I. **Definition of "Independent Contractor."**
II. **Statement of the General Rule.**
III. **Exceptions to the General Rule.**
IV. **Summary of these Exceptions.**
V. **Cases illustrating the law applicable to Casual or Collateral Negligence.**
VI. **General Conclusions.**

The Courts have shewn a tendency in recent decisions to extend the liability of the principal in some cases of negligence by contractors or their servants. The development of the law in this respect will be traced in the following summary of the cases, dealing especially with what is known as "casual" or "collateral" negligence.

I. Definition of "Independent Contractor."

"An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified before-hand": Pollock p. 72.

The following definition by Lord Bramwell is familiar:

"If there is a contract between them (i.e., employer and workman) so that the person doing the work, or doing the act complained of, has a right to say to the employer, 'I will agree to do it, but I shall do it after my own fashion; I shall begin the

wall at this end, and not at the other'; there the relation of master and servant does not exist, and the employer is not liable. But if the employer has a right to say to the person employed, 'you shall do it in this way, that is to say, not only shall you do it by virtue of your agreement with me, but you shall do it as I direct you to do it,' there the law of master and servant applies, and the master is responsible."

"Upon the principle that qui facit per alium facit per se, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrongdoer, he who had selected him as his servant, from the knowledge of or belief in his skill or care, and who could remove him for misconduct, and whose orders he was bound to receive and obey": *Quarman* v. *Burnett*, 6 M. & W. 499. But the principle above laid down cannot apply to the case where the person sought to be charged is not the master, "where he does not employ his own servants and workmen to do the work, but intrusts the execution of the work to a person who exercises an independent employment, and has the immediate dominion and control over the workmen engaged in the work."

II. Statement of the General Rule.

Therefore a person who procures work to be done for him by an independent contractor, "by an agent that is over whom he reserves no power of control," is not, as a general rule, liable for the negligence or other torts committed by the contractor or his servants in the course of the work; such negligence is known as casual or collateral negligence.

The rule is formulated by A. L. Smith, L.J., in a recent case as follows:—

"In order to render a person liable for an act of negligence, which he did not himself commit, it must be shewn by the person injured, either that the person sought to be made liable authorized the act of negligence complained of, or that it was committed by his servant in the course of his employment, or that he owed such a duty to the person injured that he could not, by

delegating its performance to a contractor, rid himself of the duty": *Hardaker* v. *Idle District Council* (1896) 1 Q.B. 335, 344.

But where the work is such that if properly done it can occasion no risk of injury to others and no restrictions are imposed by law upon the execution of it, then the contractor and not the employer is responsible for injuries to strangers from the negligent execution of the work. (Addison on Torts, 8th ed. 133). Thus, where a butcher employed a licensed drover in the way of his ordinary calling to drive a bullock from Smithfield to the butcher's slaughter-house, and the drover negligently sent an inexperienced boy with the bullock, who drove the beast into the plaintiff's shewroom, where it broke several marble chimney-pieces, it was held that the butcher was not answerable for the damage: *Milligan* v. *Wedge*, 12 Ad. & E. 737.

Among the earlier cases the most important, probably, is *Quarman* v. *Burnett* (1840) 6 M. & W. 499. The defendants in this case hired horses and a coachman from one M., and provided their own carriage and livery for the coachman, who received regular wages from M., and two shillings a week from the defendants.

An accident happened owing to the negligence of the coachman in leaving the horses without any one to hold them while he went into the house of the defendants to leave his livery there after returning from a drive. The horses bolted and the plaintiff was injured. The defendants were held not liable, as the coachman was not their servant, but the servant of an independent contractor.

III. Exceptions to the General Rule.

Several exceptions have been grafted upon this general rule, and the tendency in modern times is rather in the direction of extending the liability of the principal.

The germs of all these exceptions may be found in the judgments in *Pickard* v. *Smith* (1861) 10 C.B.N.S. 470, and *Dalton* v. *Angus*, [1881] 6 A.C. 740.

In *Pickard* v. *Smith,* the defendant was the owner of a coal-cellar opening by a trap door in a platform where passengers by a railway might lawfully walk up to the highway. He employed a coal merchant to deliver coals into the cellar through this opening. The servants of the coal merchant neglected to fence the opening, and by reason of this a passer by was injured. The owner was held liable, although the parties guilty of negligence were the servants of an independent contractor.

The following rule was laid down in that case:

Williams, J., said: "Unquestionably no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or her employment, consequently if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable.

The rule is, however, inapplicable to cases in which the act which occasions the injury is one which the employer is employed to do; nor, by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned."

"If the performance of the duty be omitted, the fact of his having entrusted it to a person who has neglected it, furnishes no excuse either in good sense or law."

"Liability for collateral negligence depends entirely upon the existence of the relation of master and servant between the employer and the person actually in default, according to the well-known exposition of the law in *Quarman* v. *Burnett.*"

"Liability for doing an improper act depends upon the order given to do that thing; and the liability for the omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done; and in the two last cases, it is quite immaterial whether the actual actors are servants or not."

In *Dalton* v. *Angus,* Lord Blackburn said (p. 829): "Ever

since *Quarman* v. *Burnett* it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of the contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor.

"He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot hereby relieve himself from liability to those injured by the failure to perform it."

In both of the latter cases, it will be noticed, that a contrast is drawn between negligence of a contractor called "collateral" or "casual," and failure on the part of the contractor to perform the duty incumbent on his employer. For the first the employer is not liable; for the second he is, whether the failure is attributable to negligence or not. The cause of action is founded in the one case upon the negligence, either of the servant acting within the scope of his employment, or of a contractor; in the other the cause of action is founded upon a breach of duty the performance of which a person could not escape by delegation to another.

"The true distinction between cases of master and servant and cases of employer and independent contractor seems to be this, that, when the person actually doing the work does something for which he would himself be liable, the master is, whilst the employer is not, liable for what is conveniently called "collateral negligence' meaning thereby negligence other than the imperfect or improper performance of the work which the contractor is employed to do": Rigby, L.J., *Hardaker* v. *Idle District Council*, post p. 352.

Since *Dalton* v. *Angus* the real question in such cases has been within which of the propositions there stated by Lord Blackburn the case falls. A series of very interesting decisions have

been given upon the question, what is "casual" or "collateral" negligence?

IV. Summary of these Exceptions.

1. The general rule only applies where the act ordered to be done is a lawful act; therefore a person who employs another to do an unlawful act, or one which cannot be done without creating a nuisance will be liable for damage resulting from the doing of such unlawful act. For example, a gas company contracted with one W. for the laying down of gas pipes in the streets of Sheffield, but they had no special powers to lay down such pipes in the streets. W.'s workmen carelessly left upon the footway of one of the streets a heap of stones and earth dug out of one of the trenches which they had made for the gaspipes. The plaintiff stumbled over the heap and broke her arm; it was held that the gas company were liable to her in damages. "It seems to me," said Wightman, J., "as it did at the trial, that the fact of the defendants having employed the contractors to do a thing illegal in itself made a distinction between this and the cases which have been cited." "I am clearly of opinion," said Lord Campbell, C.J., "that if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself. In the present case the defendants had no right to break up the streets at all." *Ellis* v. *Sheffield Gas Co.*, 2 E. & B. 767.

2. Where the employer personally interferes. The proprietor of some newly-built houses had his attention drawn by a policeman to the fact that a contractor he had employed to make a drain had left a heap of gravel by the roadside. The proprietor said he would get it removed as soon as possible, and paid a navvy to cart it away. The latter did not do his work thoroughly, and the plaintiff driving home was upset and injured.

In an action against the proprietor, *Quarman* v. *Brunett*, 6 M. & W. 499, was cited for the defence and it was urged that it was the contractor who was liable. *Held*, that defendant was liable. "If he had entirely left the matter in P.'s hands I should

have thought he was not liable but here there was evidence enough to satisfy the jury that the matter was under the personal control of the defendant": Coltman, J., *Burgress* v. *Gray* (1845) 1 C.B.N.S. 578.

3. Where the thing contracted to be done is perfectly lawful in itself, yet if the damage is caused by the doing of it in an imperfect or improper manner, and is not caused by negligence collateral to the contract, the employer will be liable. A railway company was authorized by Act of Parliament to construct a swing bridge over a navigable river; the Act provided that they should not detain vessels navigating beyond a certain time. They employed a contractor to construct the bridge, but this, through some defect in its construction, could not be opened, and the plaintiff's vessel was detained for a long time. The railway company were held responsible: *Hole* v. *Sittingbourne Ry. Co.* (1861) 6 H. & N. 488.

Pollock, C.B., said: "This does not fall within that class of cases where the principal is exempt from responsibility because he is not the master of the person whose negligence or improper conduct has caused the mischief. This is a case in which the maxim "Qui facit per alium facit per se" applies. Where a person is authorized by Act of Parliament or bound by contract to do particular work, he cannot avoid responsibility by contracting with another person to do that work. Here the contractor was employed to make a bridge, and he did make a bridge which obstructed the navigation. Where the act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized that act, the remedy is against the person who did it. That, however, generally affords but a poor compensation to the party injured: for the wrongdoer is usually a common workman. Then comes the inquiry, who is the master? The contractor. In such cases the employer is not responsible. But when the contractor is employed to do a particular act, the doing of which produces mischief, another doctrine applies. I rest my judgment simply on this, that there

is a distinction between mischief which is collateral and that which directly results from the act which the contractor agreed and was authorized to do."

Wilde, B., said: "The distinction appears to me to be that, when work is being done under a contract, if an accident happens and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorized the act and is responsible for it."

4. Where a person causes something to be done, the doing of which casts on him a duty to do the work in a particular way, he cannot escape from the responsibility of seeing the duty performed, by delegating it to a contractor: *Hole* v. *Sittingbourne Ry. Co.* (supra).

5. Where from the nature of the thing ordered to be done, injurious consequences must be expected to arise, unless means are adopted by which such consequences may be prevented, he will not be relieved from responsibility by the employment of a contractor. Plaintiff and defendant were the respective owners of two adjoining houses, plaintiff being entitled to the support for his house of the defendant's soil. Defendant contracted with a builder to pull down his house, excavate the foundations and rebuild it, the builder undertaking to shore up and support the plaintiff's house and make good any damage caused by the works.

The plaintiff's house was injured owing to the insufficient measures taken by the builder to support it, and it was held, on the principle just stated, that the defendant was liable for the injury: *Bower* v. *Peate* (1876) 1 Q.B.D. 321.

So also *Hughes* v. *Percival* (1883) 8 App. Cas. 443. The defendant was the owner of a house standing at the corner of two

streets between a house belonging to the plaintiff and a house occupied by one B.

The defendant employed a competent architect and competent builders to rebuild his house. When the house was nearly finished, the builders' workmen, for the purpose of fixing a staircase, negligently, and without the knowledge of the defendant or his architect, cut into an old portion of the party-wall, which had not been rebuilt, dividing the defendant's house from B.'s, in consequence of which the defendant's house fell, and the fall dragged over the party-will between it and the plaintiff's house, and injured the plaintiff's house.

The cutting into the first-named party-wall was not authorized by the contract between the defendant and the builders. It was held that the law cast a duty upon the defendant requiring him to see that reasonable skill and care were exercised in those operations which involved a use of the party-wall involving risk to the plaintiff. He could not get rid of responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfil the duty which the law cast on himself, and, if they so agreed together, to take an indemnity to himself in case mischief came from that person not fulfilling the duty which the law cast upon the defendant; but the defendant still remained subject to that duty, and liable for the consequences if it was not fulfilled.

So also in *Black* v. *Christchurch Finance Co.* (1894) App. Cas. 48, it was held by the Privy Council that a proprietor making a dangerous use of his property—in that case starting a bush fire to clear land—is bound to use all reasonable precautions to prevent damage to his neighbours, and if he authorizes another to act for him, he is bound, not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences.

"The ratio decidendi of these cases is, that as the duty was imposed upon the defendant by law, he could not escape liability, by delegating the performance of the duty to a contractor, for the obligation was imposed upon the defendant to take the

necessary precautions to ensure that the duty should be performed."

"The absolute character of the duty being once established, the question is not by whose hand an unsuccessful attempt was made, whether that of the party himself, of his servant, or of an 'independent contractor,' whether the duty has been adequately performed or not. If it has, there is nothing more to be considered, and liability, if any, must be sought in some other quarter. If not, the non-performance in itself, not the causes or conditions of non-performance, is the ground of liability": Pollock on Torts, 7th ed. p. 73.

V. Cases illustrating the law applicable to Casual or Collateral Negligence.

It will be remembered that Lord Blackburn in his judgment in *Dalton* v. *Angus* (supra) states that one "employing another is not responsible for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of the contractor or his servants."

What then is the "collateral" or "casual" negligence referred to? The following cases suggest an answer:—

In *Reedie* v. *London & N.W. Ry. Co.* (1849) 4 Ex. 244, defendant company agreed with certain contractors for the construction of a line; the company to have the general right of superintending the work, and the power of dismissing incompetent workmen. The plaintiff's husband was passing under a bridge which was being constructed under the contract, and was killed by a large stone which, owing to the carelessness of one of the contractors' workmen fell on him from above. It was held that the company was not liable, as the workman was not their servant, but the servant of the independent contractor.

This case is sometimes given as an illustration of non-liability for collateral or casual negligence: (see Ringwood on Torts, 4th ed. p. 237.) But it is obvious from a consideration of it that that question did not arise there. The ground of the

judgment may be stated to be that the man causing the stone to fall was not a servant of the defendant company, but of the contractors, who alone under *Quarman* v. *Burnett* (supra) could be held responsible. It is noticeable that the idea of any duty resting upon the employers (the company) does not seem to have suggested itself to the Court; this idea is of comparatively modern growth. Sir F. Pollock deals with the case in the preface to volume 80 of the Revised Reports as follows: "It may well be doubted whether *Reedie* v. *L. & N.W. Ry. Co.*, p. 541, would now be decided on the same grounds. It has been judicially cited, indeed, within the last twenty years, but not with any specific approval of its reasoning. The actual effect of the judgment may be supported on the ground that not only the person by whose negligence the plaintiff suffered was not the servant of the defendant company, but the company, though owner of the part of the line under construction, had not yet assumed occupation and control. In both these respects the case is distinguishable from *Kearney* v. *L.B. & S.C. Ry. Co.* (L.R. 6 Q. B. 759), which being in the Exchequer Chamber, is of higher authority. But the Court seems to have been unwilling to admit that the ultimate employer could ever be liable for the conduct of an "independent contractor" and the opinion which now prevails in the Court of Appeal, that "it is very difficult for a person who is engaged in dangerous works near a highway to avoid liability by saying that he has employed an independent contractor, (*Holliday* v. *National Telephone Co.* (1899) 2 Q.B. at p. 400) would probably have found little favour with the learned Baron who afterwards became Lord Cranworth. The question of what is called "casual and collateral negligence" does not arise, for the statement of the facts, though meagre, shews plainly that the negligence complained of was in the performance of the contractor's work itself."

Hardaker v. *Idle District Council* (1896) 1 Q.B. 335. A district council being about to construct a sewer under their statutory powers, employed a contractor to construct it for them. In consequence of his negligence in carrying out the work a

gas main was broken, and the gas escaped from it into the house in which the plaintiffs (husband and wife) resided, and an explosion took place, by which the wife was injured, and the husband's furniture was damaged. In an action by plaintiffs against the district council and contractor, it was held that the council owed a duty to the public (including the plaintiffs) so to construct the sewer as not to injure the gas main; that they had been guilty of a breach of this duty; that, notwithstanding that they had delegated the performance of the duty to the contractor, they were responsible to the plaintiffs for the breach; and that the damages were not too remote to be recovered. Lindley, L.J., said: "The council are not bound in point of law to do the work themselves, i.e., by servants of their own.

There is nothing to prevent them from employing a contractor to do the work for them. But the council cannot, by employing a contractor, get rid of their own duty to other people, whatever that duty be. If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more. They are not responsible for his negligence in other respects, as they would be if he were their servant. Such negligence is sometimes called casual or collateral negligence. If on the other hand the contractor fails to do what it is their duty to get done, their duty is not performed, and they are responsible accordingly."

The duty of the council "in sewering the street was not performed by constructing a proper sewer. Their duty was, not only to do that, but also to take care not to break any gas-pipes which they cut under: this involved properly supporting them. This duty was not performed. They employed a contractor to perform their duty for them, but he failed to perform it. It is impossible, I think, to regard this as a case of collateral negligence. The case is not one in which the contractor performed the district council's duty for them, but did so carelessly; the case is one in which the duty of the district council, so far as the gas-pipes were concerned, was not performed at all. The case falls within the second of Lord Blackburn's propositions, and not within the first."

Penny v. *Wimbledon* (1898) 2 Q.B. 212. Action by plaintiff for injuries received while crossing Queen's Road, Wimbledon, after dark. She stumbled on a heap of surface soil and grass, which had been left in the road without any light or protection, and suffered serious injury. This heap had been left there by a contractor employed to make good a highway. Bruce, J., said: "When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor.

Pickard v. *Smith* is an authority for the proposition that no sound distinction in this respect can be drawn between the case of a public highway and a road which may be, and to the knowledge of the wrongdoer probably will in fact be, used by persons lawfully entitled so to do."

"I subscribe to every work of this passage," said A. L. Smith, L.J., "as being the law": *The Snark* (1900) p. 110.

So far as the principle of law is concerned there is no difference between a public body and any other employer, it is by no means necessary that the duty should be public or statutory; many of the cases have involved no more than the duty owed by one individual to another.

In *Penny* v. *Wimbledon* (1899) 2 Q.B. 72, the Court of Appeal said that the principle of the decision in *Pickard* v. *Smith*, 10 C.B.N.S. 470, is this, that when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor. A. L. Smith, L.J., said: "I would add as an exception the case of mere casual or collateral acts

of negligence, such as that given as an illustration during the argument, a workman employed on the work negligently leaving a pickaxe or such like in the road. I cannot think that leaving heaps of soil in the road, which would by the very nature of the contract have to be dug up and dealt with, is an act either casual or collateral with reference to the contract."

Romer, L.J., said: "When a person, through a contractor, does work which from its nature is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability from the discharge of this duty by employing the contractor if the latter does not take these precautions. I desire to point out that accidents arising from what is called casual or collateral negligence cannot be guarded against beforehand, and do not come within this rule."

Hill v. *Tottenham Urban District Council* (1898) 79 L.T. 495. The plaintiff was being driven along a road which was under the control of the defendants and had recently been made by a contractor employed by them. While passing under a railway bridge, owing to a ridge having been left in the road after it had been repaired, plaintiff was jolted against one of the girders of the bridge and received serious injuries. It was held by Bruce, J., that the making up of a road cast upon the person making it up the duty of taking care that no obstruction, at least, no dangerous obstruction should be offered to the public. Therefore when a public body takes upon itself the making of a road, there is a duty cast upon it of taking care that no dangerous obstructions are allowed to exist to passengers passing along the road. This duty it could not evade or escape by employing a contractor to carry out the work.

In most of the cases above referred to the negligence of the contractor could not be considered as "casual or collateral."

The work authorized to be done was of a kind which necessarily involved danger to the property or persons of others.

The negligence lay in the absence of proper precautions against the danger and the fact which existed in nearly all the

cases referred to that the employer had bound the contractor by strict stipulations to take all necessary steps to avoid injury to others is no defence.

The next case in order of time is *Holliday* v. *National Telephone Co.* (1899) 1 Q.B. 221. In this there is more room for argument as to the character of the negligence which was in question.

The defendants were laying down telephone wires under the soil of a street. The wires were enclosed in metalled tubes which required to be socketed together with soldering material. They employed a person named Highmore to do this part of the work under conditions which made him not the servant of the defendants but an independent contractor.

For the purpose of obtaining light or heat for the work, one of H.'s servants used a benzoline lamp.

To produce the necessary vapour from the lamp he plunged it into the molten soldering material.

The lamp not being supplied with a sufficient safety valve, exploded and threw some of the molten metal upon the plaintiff who was passing by.

Judgment was given in the County Court in favour of the plaintiff. This was reversed by a Divisional Court on the grounds that the accident was caused by casual or collateral negligence, for which the defendants were not liable.

It was thought that the work ordered to be done by them was not in itself dangerous or calculated to interfere with or injure other persons; the negligent act of the workman was not such as could have been contemplated by the defendants, and was placed by the Court in the same category as the fall of the stone in *Reedie* v. *L. & N. W. Ry. Co.* (supra).

The case therefore was thought to differ from *Hardaker* v. *Idle D. C.* in that the accident was not caused by the omission to do something which the work ordered to be done rendered necessary, and which must have been contemplated by the employers; it was a mere casualty.

"The act" (said Wills, J., p. 228), "is about as typical an

instance of negligence merely casual, collateral or incidental, as can well be conceived."

This judgment was in its turn reversed by the Court of Appeal (1899) 2 Q.B. 392, which held that the company was liable for the negligence of the plumber, upon the ground (1) that the work was being done not by the plumber alone as an independent contractor, but jointly by the company and the plumber in such circumstances that the company were responsible for negligence in the joint operation such as that which caused the injury; and, (2) that, even assuming that the plumber was an independent contractor, as the company were carrying out a dangerous work upon a highway, whether they carried it out by themselves or by a contractor, it was their duty to take care that the works were not negligently carried out so as to cause injury to persons using the highway.

"Works were being executed," said Lord Halsbury, L.C., "in proximity to a highway, in which in the ordinary course of things an explosion might take place. It appears to me that the telephone company, by whose authority alone these works were done, were, whether the works were done by the company's servants or by a contractor, under an obligation to the public to take care that the persons passing along the highway were not injured by the negligent performance of the work."

"In my opinion," said A. L. Smith, L.J., "since the decision of the House of Lords in *Hughes* v. *Percival*, and that of the Privy Council in *Black* v. *Christchurch Finance Co.*, it is very difficult for a person who is engaged in the execution of dangerous works near a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway. I do not agree that this was a case of mere casual and collateral negligence within the meaning of that term, for it was negligence in the very act which H. was engaged to perform."

A barge belonging to the defendants, without negligence

on their part was sunk in the fairway of the Thames. They employed an underwaterman to conduct the salvage operations necessary to raise her and, for that purpose, put him in possession and control; but, owing to the guard vessel placed by him, with lights upon it, to mark the submerged barge, having been negligently allowed to get out of position, the plaintiff's steamship coming up the river, without negligence, ran upon the wreck and sustained damage. Held by the Court of Appeal, that defendants were personally responsible, as (following *Penny* v. *Wimbledon*), they were bound to see that the necessary precautions were taken to prevent danger to the public, and could not escape from this liability by throwing the blame on the contractor employed by them to do the work: *The Snark* (1900) P. 105.

The cases as to the liability of an employer for injuries caused by the negligence of his contractor were again reviewed by the Court of Appeal in the instructive case of *Maxwell* v. *British Thomson Co.* (1902) 18 T.L.R. 278.

The defendants were employed by a municipal corporation to convert their system of horse tramways into a system of electric railways worked by overhead wires. They employed a firm of sub-contractors to erect the iron standards along the streets with arms to support the wires. The sub-contractors' workmen used a high platform on wheels to enable them to attach the wires to the arms, and they left this platform so situated that certain iron rails connected with it hung over the tramways. The plaintiff, who was riding on a tram car, was thereby injured. For the defendants it was contended that they were not liable for the negligence of the sub-contractors. The test was whether the defendants had any reason to suppose that the particular act which caused the accident would be done. The act complained of was not inherent in the character of the work. It was merely collateral or casual. This platform was not a dangerous structure, and the negligent act of the sub-contractors' workmen in leaving it too near the tram lines was similar to the case of a pickaxe left in a road or a hammer dropped by a workman on

the head of a passer by, which had been held to be a collateral or casual act of negligence.

But the Court held that the failure to protect passengers was a default in the performance of the duty cast upon the defendants and was not merely an act of collateral negligence; the defendants could not lessen their responsibility to do their duty under the contract by delegating it to a sub-contractor.

"The work here was to be done upon a highway. That placed the case in a special category. The work could only be done under proper precautions to safeguard the public. That duty to do the work in a proper manner extended to the use of the instruments which were necessary for the execution of the work, and a duty lay on the defendants not only in regard to the main purpose of hanging the wires, but also in regard to the instruments which were proper for carrying out the work, to take proper precautions that those instruments did not become a source of danger to the public using the highway. They could not escape liability by delegating the work to a sub-contractor."

"The case" (says a writer) "was certainly on the border line, and it is probable that if the work had not been performed upon a highway (thus rendering special precautions necessary), the negligence might probably have been held to be casual or collateral; but under the circumstances the failure to protect passengers was considered to be a default in the performance of the duty cast upon the defendants, and the Court of Appeal, affirming Kennedy, J., held the defendants liable: Solicitors' Journal, February 8, 1902, 241-242.

In a public and busy street in the City of Toronto, a horse which was being driven, became frightened by a steam roller engaged in repairing an intersecting street, and swerving suddenly upon the plaintiff, who was passing on a bicycle, injured him. The roller was the property of the city corporation, and was being used by paving contractors under a provision in the contract with the corporation. The work was being done for the corporation and it necessitated the use of the roller. It was shewn that the roller was a machine likely to frighten horses of

ordinary courage and steadiness: that of this city corporation's servants were aware; and that proper precautions were not taken on the occasion in question to warn persons of the approach of the roller to the street on which the horse was passing. It was held that the corporation and contractors were both liable. It was contended on behalf of the city that the terms under which the paving company were accorded the use of the roller amounted to a hiring by the paving company, so as to place its working and control entirely in their hands, and that the city were relieved from responsibility for any negligence while the roller was engaged in the paving company's work. But, without determining the question as to the hiring and user, the Court held that the place where the work was to be done and the means by and the manner in which it was to be performed made it incumbent on the city, if it had been doing the work otherwise than through a contractor, to see that proper precautions were taken to guard against danger to the public from the use of the roller. That being so, it was clear that the city could not denude itself of this obligation by entrusting the work to a contractor. The city placed the performance of the work in the hands of contractors and furnished them with this dangerous machine as part of the means with which it was to be performed. The operation of the machine was likely to be attended with danger to the public. The obligation still rested on the city to see that proper precautions were taken: *Kirk* v. *City of Toronto* (1904) 8 O.L.R. 496.

In a case decided by the Court of Appeals of Kentucky, it appeared that the appellants, having a contract with the owner for the erection of a building, sublet the brick work to an independent contractor. The latter, in doing the brick work, failed to erect barricades to prevent injury to persons passing along the adjoining sidewalk. A child in passing on the sidewalk was injured by a brick falling from the scaffold erected by the independent contractor. An action for damages was brought against the original contractor, and it was held that the failure to erect such barricades for the protection of the public, considering the location of the building with respect to the

sidewalk, was a nuisance which rendered the original contractor liable for the injury to the child received while passing on the sidewalk. The Court said that while the contention of the appellant, that the independent contractor alone is liable, is the general doctrine, it does not apply to cases where the thing done or omitted to be done is of itself a nuisance, or will necessarily result in a nuisance if proper precautionary measures are not used.

Professor Bigelow puts the distinction as follows: "In *Gorham* v. *Gross,* 125 Mass. 232, Gray, C.J., said: 'Where the very thing contracted to be done is imperfectly done, the employer is responsible for it.' The distinction is between 'negligence in a matter collateral to the contract' and cases 'in which the thing contracted to be done causes mischief. The employer will be liable for the negligence of the independent contractor, or of his men, where the employer employed the independent contractor to do improper work, or to do proper work which is improperly done in the sense of being a bad job. The two kinds of negligence may together be called vice in the work."

The distinction between cases of collateral negligence and vice in the work rests on the general theory of duty, observable danger which one may avoid. Collateral negligence is not to be expected by the employed; hence danger is not observable.

It is plainly otherwise of vice in the work in either of its forms; danger is observable and harm may be avoided: Bigelow on Torts (1903) p. 337.

VI. General Conclusions.

1. In ordinary cases the rule would still appear to be that the employers of an independent contractor are not the employers of his servants, and therefore are not liable for their incidental, or casual, or collateral negligence.

2. But when the work is being done on or near a highway or public place, the work is in a special category. In such a case the work cannot legally be done without special precaution for

the protection of passersby. Then negligence of the contractors or their servants which would otherwise perhaps be regarded as casual or collateral would now usually be considered default in performance, or failure in performance of the duty to protect passengers, or "vice in the work," and the original employer would, in general, be held responsible to persons injured in consequence of this default.

3. In cases of this sort the question as to the character of the negligent act, whether casual, or collateral, or otherwise, would seem to be immaterial; it is "negligence in the very act," and therefore negligence for which the original employer is responsible.

4. Nor is the question material where the contractors are employed to do what the employers are under a duty to do, and damage is caused to third parties owing to work being not done or badly done. The ground of liability in such a case is because the employer has not performed the duty cast upon him by law. There seems to be no modern case in which the absolute duty being once established, the person owing such duty has escaped liability by shewing that the act of the contractor's servant causing the damage was casual or collateral.

N. W. HOYLES.

THE BENCH AND THE PRESS.

We feel compelled to refer to a matter which is specially within our province as a legal Journal, as it affects the honour and dignity of the Bench.

The City of Toronto has a street railway, owned by a company not by the municipality. Disputes having arisen as to the construction of a contract between the parties, they came before the Courts of Ontario. The decisions given were, in the main, in favour of the contention of the city. These were in a large measure confirmed by the Supreme Court of Canada. Counsel for the Railway Company had always stoutly contended that the Courts here had misinterpreted the contract. Cross

appeals were taken to the Judicial Committee of the Privy Council and were heard by that Court of final resort. A cablegram having stated that all questions were decided in favour of the company, some of the journals of Toronto thereupon poured out the vials of their wrath upon the law lords of the Privy Council. A writer in *The News* charged that these judges had "robbed the city of its principal rights under the street railway contract." Other papers also made similar reckless charges. No one in this country at that time knew the reasons on which their lordships arrived at their conclusions. In no event would the views of these writers be of any value as to the construction of the contract, which was the subject for adjudication, yet they had the hardihood to accuse some of the most gifted men and most highly trained legal experts in the British Empire of "robbery;" in other words, of wilfully depriving the city of its just rights. This charge was subsequently repeated by the same paper in various forms of words.

These judges, let it be noted, are men of the highest character, and absolutely indifferent to anything except the legal proposition laid before them by counsel. Were it not for the mischief done to the administration of justice and the breaking down of proper respect for the powers that be, hysterical attacks such as we have seen in these articles would only provoke merriment. This judgment not meeting with the approval of these writers, and of the Board of Control and the aldermen of Toronto, the right of appeal to England must of course be abolished, and the whole judicial system changed. It may here be remarked that "yellow journals" and aldermen (and it is the latter who urged on this litigation), frequently hunt in couples, perhaps because too many of them appeal to and live by the favour of the class who from ignorance and want of thought are most easily influenced by claptrap. Fair criticism is one thing, a charge of deliberate injustice is another. No judge would object to the former. His position prevents his replying to the latter, which is therefore very much like striking a man whose hands are tied.

The ignorance displayed in these criticisms is amazing. We had supposed that every intelligent man of affairs would have known that a cardinal principle of the law of contracts is that the whole of a contract must be taken into consideration and that the intent of the parties is to be gathered from the words used. The lords of the Privy Council apparently considered that the Canadian judges had improperly applied this principle, and reversed their findings. These newspaper writers seem to think that a document should be construed, not by what it actually contains, but by what *they* think it ought to have contained. The absurdity of such a contention is apparent as soon as stated.

The same newspaper has an editorial which is apparently intended to be complimentary to the judges of our Canadian Courts: but it is almost as insulting to our Bench as the above utterances are to the judges of the Judicial Committee. Speaking of the latter body of jurists the writer says:—"Under no circumstances could the Privy Council be familiar with the conditions under which the street railway agreement was granted; nor could they be familiar with the plain intention of its clauses as offered by the city, and accepted by the company; nor could they be familiar with the practice and the tempor of the parties to the agreement. On a technical legal interpretation of the contract the Privy Council has decided the whole case against the city, and we are likely to suffer for it for fourteen years." The writer of the above remarkable utterance alleges that the Canadian judges came to the conclusions they did because they were familiar with conditions unknown to the judges of the Privy Council, and because they were familiar with the practice and temper of the parties to the agreement; in other words, they gave their decision not according to law, but on their view of certain alleged local conditions and of the way and temper in which the parties were in the habit of treating each other; basing their judgment on supposed popular sentiment. It is surely no compliment to our judges to say that they were influenced by

town talk or by inflammatory newspaper articles or the clamour of aldermen. The mere hint of such a possibility shews the necessity of having an appeal to judges who admittedly could not be swayed by local influences.

In a subsequent article the same newspaper accuses the judges of the Privy Council of deliberately wresting from the City of Toronto its rights under the contract. It charges the Court with having done "its best to strip the city of any standing or right in connection with the Toronto Railway Company." A cartoon published in the same paper added point to the libel. Anything more discreditable to Canadian journalism than the baseless charges in the newspaper referred to has never appeared in this country. The only end served by such writing is anarchy. Nothing is more potent for evil in that direction than slanderous imputations of injustice to those who are called upon to dispense justice. When once the public has lost confidence in the judiciary of a country, that country has lost its greatest safeguard for law and order.

Happily the daily press of Toronto, referring especially to those journals which most abuse their powers, has ceased to wield the influence it once did, and people are more and more beginning to think for themselves, and to criticise rather than to accept, as either weighty or conclusive, the foolish or extravagant or misleading utterances of individuals, who, whilst claiming the dignity of the editorial "we," too often exhibit either their ignorance, or their desire for the applause of the least worthy element of society. But

> "Slander meets no regard from noble minds.
> Only the base believe what the base only utter."

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

MORTGAGE—CONSOLIDATION OF MORTGAGES—PUISNE MORTGAGEE—EXPRESS CONTRACT—CONTRARY INTENTION—CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44 & 45 VICT. C. 41), S. 17.

In *Hughes* v. *Britannia Permanent Building Society* (1906) 2 Ch. 607, Kekewick, J., decided that even where there is an express agreement (which is now necessary under the Imperial statute 44 & 45 Vict. c. 41, s. 17) entitling a mortgagee to consolidate his mortgage, such an agreement will not prevail as against a subsequent mortgagee of any one of the mortgaged premises, of whose mortgage the first mortgagee has notice, so as to compel the subsequent mortgagee to redeem other mortgages created by the mortgagor in favour of the first mortgagee after such subsequent mortgagee acquired his rights, but, of course, the right of consolidation extends to all mortgages existing at the time of the taking of the subsequent mortgage.

POWER—SPECIAL POWER—EXERCISE OF POWER BY WILL—"APPOINT"—INDICATION OF CONTRARY INTENTION.

In re Weston, Neeves v. *Weston* (1906) 2 Ch. 630. Under a settlement made in 1863 a testator had a power to appoint in favour of his children certain leasehold property; by his will after making bequests of a watch, picture and organ, he devised bequeathed and "appointed" all the residue of his estate, real and personal, to trustees upon trust to convert into money, such part of the trust estate as should not consist of money, and out of the proceeds pay funeral expenses and debts and divide the residue of "such trust moneys and premises" equally between two of his sons (declaring that he made no provision for his other children as they were already sufficiently provided for). The testator then empowered his trustees to postpone the conversion of his "real and personal estate" for so long as they should think proper, and, during the postponement, to manage, lease or let his "real and leasehold estates" and out of the capital or income to provide for improvements, repairs, insurance for the benefit of his "real or personal estate," but declared that no part of his property not actually producing income

which should form part of his estate, should be treated as producing income. The testator also declared that the trustees might invest the trust representing the shares of his said two sons during their respective minorities in certain specified securities, and that the whole income of their shares should be paid to their guardian during their minorities for maintenance. Buckley, J., held that, notwithstanding the use of the word "appointed" in the will, the whole tenor of the will shewed that the testator was only dealing with his own property, and that the dispositions he had made were inconsistent with any intention to exercise the power of appointment and therefore that the will was not an exercise of the special power of appointment.

LANDLORD AND TENANT—COVENANT BY LANDLORD TO PAY RATES—COVENANT WITH LESSEE "HIS EXECUTORS, ADMINISTRATORS AND ASSIGNS"—UNDERLEASE—UNDERLESSEE NOT AN "ASSIGN"—32 HEN. VIII. C. 34, S. 2—(R.S.O. C. 330, S. 13).

In *South of England Dairies* v. *Baker* (1906) 2 Ch. 631 the plaintiffs were underlessees of certain premises for an unexpired term, and brought the action against the assignee of the reversion of the superior landlord, who had covenanted with the plaintiffs' lessor his "executors, administrators and assigns" to pay the rates assessed on the demised premises; for breach of the covenant, and Joyce, J., held that the action would not lie on the ground of want of privity, an underlessee not being an "assign" of the original lessee within 32 Hen. VIII. c. 34, s. 2 (R.S.O. c. 330, s. 13), and that there was no principle of equity by which the action could be maintained.

VENDOR AND PURCHASER—TITLE DEEDS—CUSTODY OF DEEDS—DOCUMENTS SHEWING EXISTENCE AND EXTINGUISHMENT OF EASEMENT APPURTENANT TO LAND SOLD—RETENTION BY VENDOR OF FORMER SERVIENT TENEMENT.

In re Lehmann v. *Walker* (1906) 2 Ch. 640 was an application under the Vendors and Purchasers' Act to determine the right to the custody of certain title deeds. The deeds in question shewed the existence of an easement appurtenant to the land sold, and also its extinguishment, the vendor retained the former servient tenement and claimed to be entitled to retain the deeds in question, and Eady, J., held that his claim was well founded.

DISENTAILING DEED—PROTECTOR OF SETTLEMENT—LEGAL ESTATE IN TRUSTEE—VOID TRUST FOR ACCUMULATION—BENEFICIAL OWNER—HEIR—FINES AND RECOVERIES ACT, 1833 (3 & 4 WM. IV. C. 74) SS. 22, 27—(R.S.O. C. —, SS. 23, 15)—THELLUSSON ACT (39 & 40 GEO. III. C. 98) S. 1—(R.S.O. C. 332, S. 2).

In re Hughes and London and North Western Ry. Act (1906) 2 Ch. 642. This was a petition for the purpose of obtaining a declaration of the Court that a disentailing deed affecting moneys in Court was effectual to bar the entail absolutely. The question turned on whether or not there was a protector of the settlement. The entail had been created by will whereby the testator who died 3 April, 1854, devised the land in question to three trustees during the lives of 3 persons and the survivor of them to pay certain annuities and accumulate the surplus rents and profits and hold them for the trusts therein mentioned. In 1879, and after the termination of the trust estate the testator devised the land to his grandson in entail, the Court by order declared that the trust for accumulation after 3 April, 1875, was void under the Thellusson Act, s. 1 (R.S.O. c. 332, s. 2), and that thereafter the heir at law was entitled beneficially to the surplus rents and profits. The land in question having been expropriated by a railway the purchase money was paid into Court, and in July, 1875, the tenant in tail executed a disentailing deed of the land and the purchase money, and in this deed the surviving trustee of the will joined as protector of the settlement. In these circumstances Eady, J., held that the entail had been effectually barred, and that there was in fact no protector of the settlement, because the trustees under the settlement from and after the 3 April, 1875, became bare trustees of the inheritance, and as such could not be protectors under the Fines and Recoveries Act, s. 27, (R.S.O. c. 122, s. 15), and that the heir at law who was beneficially entitled was also, by the same section, precluded from being protector.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] [March 13.

MONTREAL STREET RY. CO. *v.* MONTREAL CONSTRUCTION CO.

Vendor and purchaser—Sale of securities—Interpretation of contract—Railways—Debtor and creditor—Right of way claims—Legal expenses incurred in settlement.

The plaintiffs sold the defendants stocks and bonds of the P. & L. Ry. Co. with an agreement in writing which contained a clause stipulating as a condition that the vendees might declare the option of paying a further sum of $30,000, in addition to the price of sale, in consideration of which the vendors agreed to pay all the debts of the P. & I. Ry. Co., except certain specially mentioned claims, some of which were in respect of settlement for the right of way. The final clause of the agreement was as follows:—"After two years from the date thereof the Montreal Street Railway Company will assume the obligation of settling any right of way claims which the vendors may not previously have been called upon to settle and will contribute $5,000 towards the settlement of any such claims which the vendors may be called upon to settle within the said two years. Any part of the said sum not so expended in said two years or required by the purchasers so to be, shall be paid over to the vendors at the end of the said period, it being understood that the purchasers will not stir up or suggest claims being made." The vendees exercised the option and paid the $30,000 to the vendors who reserved their right to any portion of the $5,000 to be contributed towards settlement of the right of way claims which might not be expended during the two years. An unsettled claim for right of way, in dispute at the time of the agreement, was subsequently settled by the vendors within the two years. The question arose as to whether or not this existing claim and legal expenses connected therewith was a debt which the vendors were obliged to discharge in consideration of the extra $30,000 so paid to them, and whether or not the $5,000

was to be contributed only in respect of right of way claims arising after the date of the agreement.

Held, affirming the judgment appealed from, that the agreement must be construed as being controlled by the provisions of the last clause thereof; that said last clause was not inconsistent with the previous clauses of the agreement and that the vendees were bound to contribute to the payment of such claims and legal expenses in respect of the right of way to the extent of the $5,000 mentioned in the last clause.

Hague, for appellants. *Dandurand,* K.C., for respondents.

Que.] MAYRAND *v.* DUSSAULT. [April 2.

Will—Testamentary capacity—Undue influence—Fraud and artifice—Improper suggestion—Captation—Importunity—Deception by beneficiary—Concurrent findings of fact—Reversal on appeal—Practice—Revocation of former will—Onus of proof.

The promoter of a will by which he takes a benefit is obliged to produce evidence clearly shewing that, in making the will, the testator acted without improper suggestion or undue influence in the revocation of a former will. Shortly after his marriage, the testator and his wife made their wills, respectively, by which they each constituted the other general residuary legatee. A short time before the death of the testator from a wasting disease, the defendant took advantage of the testator's weakness and by artifices and improper suggestions so influenced him as to secretly procure the execution of another will by which the former will was revoked and the defendant was given the bulk of the testator's estate.

Held, reversing the judgment appealed from, that, under the circumstances, the insidious methods persistently made use of by the defendant amounted to captation and undue influence and that, in the absence of clear proof that the testator was not deceived and misled thereby, the will should be annulled.

As there were concurrent findings by the courts below against the contention that the testator was of unsound mind at the time of the execution of the second will, the Supreme Court of Canada refused to interfere on that ground.

Bisaillon, K.C., for appellant. *Mignault,* K.C., and *Bonin,* K.C., for respondent.

N.B.] [March 13.

CARLETON WOOLEN MILLS *v.* TOWN OF WOODSTOCK.

Municipal corporation—Exemption from taxes—Resolution of council—Discrimination—Establishment of industry.

By s. 1 of 36 Vict. c. 81, the New Brunswick Legislature authorized the Town Council of Woodstock from time to time to "give encouragement to manufacturing enterprises within the said town by exempting the property thereof from taxation for a period of not more than ten years by a resolution declaring such exemption." In 1892 the council passed the following resolution: "That any company establishing a woolen mill in the Town of Woodstock be exempted from taxation for a period of ten years."

Held, per DAVIES, IDINGTON and MACLENNAN, JJ., that this resolution provided for discrimination in favour of companies and against individuals who might establish a woolen mill or mills in the town, and was therefore void. *City of Hamilton* v. *Hamilton Brewing Association*, 38 S.C.R. 239, followed.

Held, per DAVIES, J. The resolution exempting any company and not any property of a company was too indefinite and uncertain to found an exemption upon.

In 1893 a woolen mill was established in Woodstock by the Woodstock Woolen Mills Co., and operated for some years without taxation. In 1899 the mill was sold under execution, and two months later The Carleton Woolen Mills Co. (appellants) were incorporated and acquired the said mill from the purchaser at the sheriff's sale and have operated it since.

Held, per FITZPATRICK, C.J., and DUFF, J., that the appellants could not by so acquiring the mill which had been exempted be said to have "established a woolen mill," without shewing that when it was acquired it had ceased to exist as such, which they had not done. Appeal dismissed with costs.

Carvell, for appellants. *Vince* and *Hartley*, for respondents.

Ont.] [March 19.

JAMES BAY RY. CO. *v.* ARMSTRONG.

Appeal—Railway Act—Expropriation—Appeal from award—Choice of forum.

By s. 168 of 3 Edw. VII. c. 58, amending the Railway Act, 1903 (s. 209 present Act) if an award by arbitrators on expro-

priation of land by a railway company exceeds $600, any dissatisfied party may appeal therefrom to a Superior Court, which in Ontario means the High Court or the Court of Appeal (Interpretation Act, R.S., 1906, c. 1, s. 34, sub-s. 26).

Held, that if an appeal from an award is taken to the High Court there can be no further appeal to the Supreme Court of Canada which cannot even give special leave.

Armour, K.C., and *R. B. Henderson*, for appellants. *DuVernet* and *Kyles*, for respondent.

Ont.] ROBINSON *v.* MCGILLIVRAY. [April 2.

Appeal—Amount in controversy—Creditor's action—Transfer of cheque.

R. on behalf of himself and all other creditors of McG. brought an action for a declaration that the transfer of a cheque for $1,025.00 by McG. to S. was preferential and void, and or recover the proceeds of said cheque for distribution among the creditors. The judgment of the High Court, affirmed by the Court of Appeal, dismissed the action.

Held, that the only matter in controversy was the property in the sum represented by the cheque, and such sum being more than $1,000.00, an appeal would lie. Motion to quash dismissed.

Shepley, K.C., for motion. *Chrysler*, K.C., contra.

Ex. Ct.] SHIP "WANDRIAN" *v.* HATFIELD. [April 2.

Maritime law—Collision—Negligence—Tug and tow — Negligence of tug.

A tug with the ship "Wandrian" in tow left a wharf at Parsboro', N.S., to proceed down the river to sea. The schooner "Helen M." was at anchor in the channel and the tug directed its course so as to pass her on the port side, when another vessel was seen coming out from a slip on that side. The tug then, when near the "Helen M." changed her course without giving any signal and tried to cross her bow to pass down on the starboard side, and in doing so the "Wandrian" struck her inflict-

ing serious injury. In an action against the "Wandrian" by the owners of the "Helen M." the captain of the former insisted that the schooner was in the middle of the channel, which was about 400 feet wide, but the local judge found as a fact that she was on the eastern side.

Held, affirming the judgment of the local judge (11 Ex. C.R. 1) that the navigation of the tug was faulty and shewed negligence; that if the "Helen M." was on the eastern side of the channel as found by the judge there was plenty of room to pass on her port side, and if, as contended, she was in the middle of the channel she could easily have been passed to starboard; and that in attempting to cross over and pass to starboard when she was so near the "Helen M." as to render a collision almost inevitable, was negligence on the tug's part, and that the "Helen M." exercised proper vigilance and was not negligent in failing to lengthen her anchor chains as the "Wandrian" was too close and had not signalled.

Held, also, that the tow was liable for such negligence in the navigation of the tug. Appeal dismissed with costs.

Coster, K.C., for appellants. *McLean*, K.C., for respondent.

Ex. Ct.] [April 2.

COPELAND-CHATTERSON CO. *v.* PAQUETTE.

Patent of invention—Infringement—Novelty—New and beneficial results—Subject matter of invention—Purchase of patented device—Estoppel.

The plaintiffs were patentees of an alleged device intended to cheapen and simplify former methods of keeping and rendering statements of accounts by merchants and others, as was claimed, by providing for making entries and invoices by one and the same act, on manifolding sheets so folded as to occupy the entire platen of standard typewriters, and, at the same time, without waste, to provide a binding margin for the leaf with the bookkeeping entry to utilize it as a page in a permanently bound book. The sheets manufactured and sold by the plaintiffs accomplished these ends through being folded so as to form two or three leaves, as required, with two-leaf sheets, the upper leaf forming an original or invoice and the lower sheet the duplicate and bookkeeping entry; with three-leaf sheets, the third leaf serving either as a duplicate or to be used as an original dupli-

cated on the reverse side of the centre leaf. In each case the leaves are connected together so as to form one integral sheet with vertical and transverse score lines enabling the invoices, etc., to be easily detached leaving the permanently retained page and folded margin with perforations to fit binders. The specifications of the patented device succinctly described and illustrated various forms of folding the sheets to secure its advantages. An action for infringement by the defendants manufacturing and selling sheets similar to the above described device was dismissed in the Exchequer Court. On appeal to the Supreme Court of Canada, it was

Held, affirming the judgment appealed from (10 Ex. C.R. 410) that there was neither subject matter nor novelty in the device claimed as an invention and consequently that it was not patentable.

Raney, for appelants. *Mignault*, K.C., and *Perron*, K.C., for respondent.

EXCHEQUER COURT.

Burbidge, J.] MASSICOTTE v. THE KING. [March 18.

Public Work—Negligence—Injury to person.

Upon a claim for damages by the widow of an employee of the Government, who was killed by the explosion of one of the boilers of a dredge, such accident being alleged to have been caused by the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment, the registrar, acting as referee, found that the deceased met his death in an explosion which happened by reason of his own neglect of duty as watchman of the boilers on the dredge; and not by reason of the negligence of some fellow-servant, being an officer or servant of the Crown, as alleged. On appeal from the Registrar's finding on this question of fact, it was contended that as the type of boilers used on this dredge required constant and exacting care and watchfulness to see that sufficient water was maintained therein, and that any neglect of duty in that behalf was likely to lead to an explosion, the deceased's superior officers

were negligent in permitting him to be, and remain in charge of such boilers.

Held, affirming the Registrar's report, that the facts did not disclose a case of negligence for which the Crown should be liable under R.S.C. 1906, c. 140, s. 20 (*c*); and that the accident happened through deceased's own fault, and not through the neglect of his fellow-servants. The deceased knew as well as his fellow-servants the care that was required in his employment, and the danger to which he was exposed in case he neglected his duty.

Martineau, K.C., for supplicant, *Bérard,* for respondent.

Burbidge, J.] [March 25.

UPSON WALTON COMPANY v. SHIP "BRIAN BORU."

Shipping—Goods supplied to ship—Liability of owners—Credit advanced to ship.

Appellants, who were ship-chandlers, had for a long period been in the habit of supplying the D. C. Company, with goods for use on their dredges, tug-boats and other contracting plant. The goods were generally supplied in small quantities, and paid for on delivery. It was not shewn that there was ever an open account between the appellants and the company. In September, 1904, and later in that year the said company were working upon a breakwater, part of the plant with which that work was carried on consisted of a dredge, a tug-boat and two dump-scows. These vessels had been leased by the said company to the D. & S. D. Corporation. During the months of September, October and November 1904, the appellants supplied to the D. C. Company goods which were used on the said vessels or in connection with the work that was being carried on by means thereof. The goods were ordered by the D. C. Company's foreman, and were charged to that company in the appellants' books, and the accounts therefor were in the first instance made out to the D. C. Company. In that respect there was at the time no change in the manner of dealing between the appellants and the D. C. Company; but after such company had made an assignment, the appellants sought to enforce the claim against the defendant vessels.

Held, affirming the judgment of the local judge, that the

goods were supplied on the credit of the D. C. Company, and not on the credit of the vessels themselves, and that the action should be dismissed.

J. H. Rodd, for appellant. *F. A. Hough*, for respondents.

Province of Ontario.

HIGH COURT OF JUSTICE.

Divisional Court.] [Feb. 28.

INTERNATIONAL TEXT BOOK CO. *v.* BROWN.

Constitutional law—Powers of provincial legislature—B.N.A. Act s. 92, sub-s. 2.—Act respecting licensing of extra provincial corporations—Intra vires—Company carrying on business in Ontario.

The plaintiffs, a company incorporated in the State of Pennsylvania, to carry on a printing, publishing and bookbinding business, with the head office in that State, carried on, as one of its department, under a special charter therefor, procured in the same State and with the same head office, what was called "The International Correspondence School," the object being to give by correspondence through the mails, instruction to applicants, for enrolment as students, the company having representatives throughout the province for procuring such applications, all of which were submitted to the head office for approval, and, if accepted, the certificates of enrolment were sent direct to the students with the lesson and instruction papers, followed at stated intervals by further instruction and lesson papers, pamphlets, etc. and, when the contract so provided, lesson books in bound form, drawing materials, phonographic and other outfits, were loaned to the students. The company had an office in Toronto, over which their name was affixed, with a superintendent, cashier and a number of stenographers, to which all moneys collected in this province were forwarded to, and from there remitted to the head office: while the bound lesson books, &c., for convenience of passage through the customs were sent from the head office to Toronto, and after pay-

ment of duties, were forwarded by the postmaster to the students. Salaries, etc., were paid by the cashier at Toronto, out of the moneys in his hands.

Held, that 63 Vict. c. 24 (*o*) for licensing of extra provincial corporations, was intra vires the provincial legislature, as coming within s. 92, sub-s. 2 of B.N.A. Act, being a mode of direct taxation within the province, or as relating to the issuing of licenses in order to the raising of a revenue; and that the plaintiffs were carrying on business in Ontario within the meaning of the Act, so as to necessitate their taking out a license, and their omission to do so precluded them from maintaining an action for the recovery of moneys claimed to be due from one of the enrolled students.

Eyre, for plaintiffs. *Blackburn*, for defendant. *Cartwright*, K.C., and *Mulvey*, K.C., for the Attorney-General.

Divisional Court.] REX *v.* HUDGINS. [March 1.

Justice of the peace—Jurisdiction—Delay in issuing summons—Liquor License Act, Criminal Code s. 539*—Prohibition—Certiorari.*

By s. 95 of R.S.O. 1897, c. 245, an information for an offence must be laid within thirty days of its commission thereof, and s. 559 of the Criminal Code, the justice upon receiving any complaint or information "shall hear and consider the allegations of the complainant, and, if of opinion that a case for so doing is made out, shall issue a summons," the form of summons given in the schedule referring to the offender as having "this day" been charged, etc.

The offence was committed on the 12th, and the information laid on the 24th of October, but the summons, though dated the 24th of October, was not issued until the 14th of January following. After notice of motion for prohibition had been served on the magistrate, he made his conviction, and on the return of the motion it was agreed that the motion should be deemed, as asking in the alternative for a writ of certiorari.

Held, affirming the judgment of ANGLIN, J., that the prohibition would not be granted, but a writ of certiorari was directed to issue.

Middleton, for appellant. *Cartwright*, K.C., for the Crown and convicting magistrate.

Falconbridge, C.J.K.B., Britton, J. Riddell, J.] [March 11.

YEATES *v.* GRAND TRUNK RY. CO.

Railways—Accident—Injury to cattle—Crossing—Negligence—Special agreement—Liability—Tenant—Railway Act 1903.

Held, that on the proper construction of section 237, subsection 4, of the Canada Railway Act 1903, 3 Edw. VII. c. 58 D. which enacts that: "When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company, and are killed or injured by a train, the owner of such animals, so killed or injured shall be entitled to recover the amount of such loss or injury against the company...unless the company...establishes that such animals got at large through the negligence...of the owner or his agent...the reference is not to the case of animals getting upon the railway from and adjoining field or enclosure, but only to animals at large upon the highway, or otherwise at large. It can have no reference to animals escaped from an adjoining field where, apart from any defect in railway fencing, they were properly enclosed. The action was brought for the loss of cattle of the plaintiff, which escaped from the plaintiff's enclosure and got upon the defendant's railway and were killed. The plaintiff was a lessee of the said enclosure from the owner for one year, and his animals were therefore lawfully pasturing there, and got on the railroad owing to a defective gate at the farm crossing. It appeared that prior to the plaintiff's lease the owner had agreed with a servant of the defendants', that he the owner might put in the crossing, provided he did it himself and would keep his gates up, and that the defendants should not be responsible for anything he might lose on that crossing.

Held per BRITTON and RIDDELL, JJ., that this agreement exonerated the defendants, the plaintiff being bound by it whether he knew of it or not when he took his lease.

Semble, also per BRITTON, J., that were it not for the said agreement the defendants would have been liable. The plaintiff would not be disentitled to recover by reason of his continuing use of the faulty gate and its fastenings, for as between him and the defendants, it was the duty of the defendants to provide a proper gate and fastenings as provided by statute. Such knowledge as the plaintiff had, and such use as the plaintiff made, of the gate and fastenings as they were would not warrant the conclusion that the plaintiff had adopted them as sufficient.

Held, also per RIDDELL, J., that the plaintiff's contributory negligence disentitled him to recover. It was proved by evidence properly admitted that the plaintiff had agreed with the owner to keep up the gates, and while this could not be relied upon by the defendants as an estoppel, or, in itself, a perfect defence, it was cogent evidence of contributory negligence, for the plaintiff knew it was his duty to keep the gate in repair and he knew that the gate was not a safe gate, yet he deliberately put his animals into the field. He had no right to have the defective gate in the defendants' fence except under the express agreement between the owner and the defendants, and that was under the express condition of keeping the gate in proper repair. This condition he undertook to fulfill and failed, and by reason of this failure he had been damnified. Therefore the only cause of the accident was his own neglect.

Weir, for plaintiff. *Foster*, for defendants. *McGowan*, K. C., for third party.

Court of Appeal.] REX *v.* BRINLEY. [March 14.

Criminal law—Bigamy—Foreign divorce—Domicil—Constitutional law—Criminal Code, s. 275.

Case reserved by the junior judge, of the County of Huron, sitting in the County Court judge's Criminal Court.

The defendant was charged with bigamy under s. 275, subs. 4. of the Criminal Code. He was, and had always been, a British subject, and was married in the County of Huron in 1897. In 1903, his wife left him and went to reside in Michigan. She then intended to separate from her husband and had no intention of ever returning, and thenceforth made her home in Michigan. In 1906, she obtained a divorce from the defendant in Michigan, on the ground of extreme cruelty. The defendant was not served with any notice of the divorce proceedings and took no part therein. In 1906, the defendant went to Detroit, Michigan, and went through a form of marriage with another woman before an officer duly qualified, under the laws of that State. He left Canada with intent to go through the form of marriage with her, and immediately afterwards returned with her to his residence in the Township of Goderich in Ontario. Before obtaining his marriage license in Goderich, he had obtained legal advice that the divorce decree obtained by his wife in 1906, was legal and binding, and that he was at liberty to marry again if he saw fit.

Held, 1, in answer to case submitted, that the decree of divorce obtained in 1906, was not a valid and binding divorce or of any effect in Ontario, inasmuch as the defendant's marriage had been solemnized in Canada, and the defendant had been at the time and always afterwards a British subject, resident and domiciled in Canada, and had never appeared or taken any part in the proceedings in the Michigan Court.

2. The fact that the defendant knew that the decree of divorce had been granted before he went through the form of a second marriage, and that he could legally marry again was no defence to the indictment, on the ground that the element of intent or mens rea was thereby removed.

3. Paragraph (*a*) of sub-s. 1, of the Criminal Code 1892, is *intra vires* of the Parliament of Canada when read with the limitation imposed by sub-s. 4, that no person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such person being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.

Cartwright, K.C., for the Crown. *Proudfoot*, K.C., for the defendant.

Riddell, J.] STURGIS *v.* VAN EVERY. [April 8.

Accountant's office—Issue of cheque—Refusal to accept—Delay in second application—Special application—Costs of—Interest on amount.

The accountant's office exists and the High Court receives money primarily for the protection of infants and others not competent to deal with their own property, and those who cannot be found: the machinery of the Court not being intended as a convenience for those who are *sui juris* and know their rights, it is the duty of those entitled to receive money out of the Court to apply for it at the earliest moment reasonably possible.

Held, that a party so entitled, who had refused to accept a cheque, on the ground that the solicitor who applied for and obtained it had no authority so to do, and delayed seventeen years in applying for it, must pay the costs of an application to the Court on the ground of the outstanding cheque, (which was not accounted for), and should only get interest at the rate of 3%, while the money was in Court.

Middleton, for applicant. *Harcourt*, official guardian, for the accountant.

Book Reviews.

The Canadian Law of Banks and Banking: the Clearing House, Currency, Dominion Notes, Bill, Notes, Cheques and other Negotiable Instruments. By JOHN DELATRE FALCONBRIDGE, M.A., L.L.B., Osgoode Hall, Barrister-at-law. Toronto: Canada Law Book Company, Limited. 1907. 721 pp. $6.50.

This comes with commendable promptitude after the re-enactment of the Bank Act of the Bills of Exchange Act, now appearing as chapters 29 and 119 of the Revised Statutes of Canada, 1906.

As the author tells us, the former Act established a system of banking differing in many respects from that prevailing either in England or the United States. The whole Act is a codifying Act, making plain many matters which before were obscure, and giving statutory sanction to many propositions which formerly required to be supported by authorities. Many changes in form in the revision of 1906 make such a work as this before us necessary. These and other changes make English works on the subject now inconvenient guides to the Canadian Act.

The author has succeeded in giving us a luminous view of both the above Acts, enabling the reader with much ease to at once turn to the point upon which information is required. Both Acts are extensively annotated with Canadian and English cases. The history of Dominion legislation, resulting in the present Banking Act, is referred to in the introductory chapter. To every one interested in banking law this is very interesting information.

The author does not claim that the second part of the work, which is devoted to negotiable instruments, and the Bills of Exchange Act, is at all exhaustive as to these subjects; but he has been successful in pointing the reader to where a more detailed information is obtainable.

We congratulate the author upon his first attempt at book making. The work is all the more valuable from the fact referred to in the following sentence in the preface: "I am much indebted to my father (the learned Chief Justice of the King's Bench Division), for the affectionate care with which he read the whole book in proof form."

Canada Law Journal.

VOL. XLIII. MAY 15. NO. 10.

ADMIRALTY JURISDICTION OVER MARITIME TREATY RIGHTS.

A recent judgment of the Supreme Court in the case of *The Ship D. C. Whitney* v. *St. Clair Navigation Co.*, 43 C.L.J. 252, 38 S.C.R. 303, promulgates what seems to be a new doctrine in maritime law that a foreign vessel, passing through a river dividing Canada from the United States, under a treaty conceding that the passage of the ships, vessels and boats, of both nations, shall be equally free and open to both nations is not—even when on the Canadian side of the river—within Canadian control, so as to subject such foreign vessel to arrest on a warrant from the Court of Admiralty. The warrant to arrest a foreign vessel cannot be issued until she is within the jurisdiction of the Court.

The trial was for a collision between two American ships in American waters; the offending ship having been arrested on the Canadian side of the river Detroit; while, as found by the Supreme Court, on a voyage "passing through" such river from one American port to another—a fact apparently not proved before the trial Court, as there is no record of it in the printed appeal book. Mr. Justice Idington says "the vessel was assumed, but not proven, to have been in motion." The judgment of the trial Court is reported in 10 Ex. C.R. 1.

The Supreme Court holds that the following article in the Ashburton Treaty of 1842 renders an American ship immune from arrest by a Canadian Court while "passing through" the Canadian side of the boundary rivers named.

"VII. It is further agreed that the channels in the rivers St. Lawrence on both sides of the Long Sault Islands, and of Barnhart Islands; the channel in the river Detroit on both sides of the Island Bois Blanc, and between that island and both the American and Canadian shores; and all the several channels and pas-

sages between the various islands lying near the junction of the river St. Clair, with the lake of that name, shall be equally free and open to the ships, vessels and boats of both parties."

To the rivers in "passing through" which all American vessels are thus declared to be immune from Admiralty process of arrest, must be added the St. Lawrence, Yukon, Porcupine and Stikine, under article XXVI. of the Treaty of Washington, 1871, which provides that the navigation of these rivers, ascending and descending "from, to, and into, the sea, shall forever remain free and open for the purposes of commerce" to the subjects of the Britannic Majesty and to the citizens of the United States, "subject to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation."

This latter clause in the article conceding free and open navigation for the purposes of commerce to both nations, subject to the conditions prescribed, is an acknowledged doctrine of international law, and though not expressed in the article of the Treaty of 1842, applies equally to that treaty as it does to the Treaty of 1871. For no treaty con be construed to carry with it, by presumption or implication, a surrender, in so far as the privileged territorial concession is concerned, of one of the highest rights of sovereignty, viz., that of legislation (Hall's International Law, 5th ed., p. 340); or to relieve the treaty-privileged alien citizens of the foreign nation, while within the territory of the conceding nation, of their subordination to the general public laws and police regulations affecting such privileged territorial concession within such territory. And one of the doctrines of international law is that all such treaties are to be construed most favourably to the conceding nation: *United States* v. *Arredondo*, 7 Peters U.S. 691.

The Roman law declared that all navigable rivers were so far public property, that a free passage over them was open to everybody; and the use of their banks (jus litoris), for anchoring vessels, lading and unlading cargo, and acts of the like kind, and to be incapable of restriction by any right of public domain.

It will not, however, be necessary to review the opinions of text writer on the claims of this natural right of nations to the free passage of ships through rivers flowing through several sovereignties. Wheaton on International Law says: "It was a right, as real as any other right; and were it to be refused, or to be shackled by regulations not necessary for the peace or safety of the inhabitants, as to render its use impracticable to us (the United States) it would then be an injury of which we should be entitled to demand redress."

The reasons given by the learned judge of the Supreme Court, which were concurred in by a majority of the Court, are thus expressed: "I do not think that the D. C. Whitney, a foreign ship, while sailing from one port of a foreign country to another port of that country, and passing through, in the course of her voyage, one of the channels declared by convention or treaty to be equally free and open to the ships, vessels and boats of both countries, can be said to be within any jurisdiction conferred on any Canadian Court by the sovereign authority in control of the Dominion of Canada even though that channel happened to be Canadian waters": 38 S.C.R. 309.

The "jurisdiction conferred on the Canadian Court by the sovereign authority in control of the Dominion of Canada" over any vessel being in, or lying, or passing off the Canadian coast, or being in or near a Canadian channel, river or navigable water, is thus described in the Imperial "Merchant Shipping Act, 1894," not cited to, or noticed by, the Supreme Court, although it has been statute law since 1854:

"685. Where any district within which any Court, justice of the peace, or other maigstrate, has jurisdiction, either under this Act, or under any other Act, or at common law, for any purpose whatever, is situate on the coast of any sea, or abutting on, or projecting into, any bay, channel, lake, river, or other navigable water, every such Court, justice, or magistrate shall have jurisdiction over any vessel being on, or lying or passing off, that coast, or being in or near that bay, channel, lake, river or navigable water, and over all persons on board that vessel, or

for the time being belonging thereto, in the same manner as if the vessel or persons were within the limits of the original jurisdiction of the Court, justice or magistrate."

"712. This part of this Act shall, except where otherwise provided, apply to the whole of Her Majesty's Dominions." And section 13 of the Admiralty Act, 1891, supplements these sections of the Imperial Statute: "Any suit may be instituted in any district registry, when the ship or property, the subject of the suit, is, at the time of the institution of the suit, within the district of such registry."

The decision of the Supreme Court seems also to conflict with the ratio decidendi of cases in which international rights have been violated. In the case *Richmond* v. *United States*, 9 Cranch U.S. 102, Chief Justice Marshall, of the Supreme Court of the United States, held that although the seizure of an American vessel within the territorial waters of a friendly nation was an international offence against that nation, the civil Court had no jurisdiction to take cognizance of it. The jurisdiction affecting the mode of seizure belonged to the political, not the judicial, department of the government; and the civil Court could not connect an international trespass with the subsequent seizure and trial of the vessel by the civil Court having ordinary jurisdiction in the case, so as to annul the proceedings against such vessel; that being "found" within the territorial jurisdiction of the civil Court, it was competent to try the case.

A similar doctrine governs the powers of criminal Courts. Thus where an alleged criminal has been kidnapped in Peru and brought to the United States, the Court held that having been "found within the jurisdiction of a Court competent to try him," his mode of arrest could not be considered by the Court, or used as evidence to oust its jurisdiction to try him for the offence charged: *Ex parte Ker*, 18 Fed. R. 167. So where an alleged criminal had been captured in Hamburg, and brought to England against his will, it was held by the Central Criminal Court that being "found within the jurisdiction of a competent Court," that Court had jurisdiction to try him for the alleged offenee: *Reg.* v. *Sattler*, 27 L.J.M.C. 50.

None of the above sections, or any doctrine of international law recognizes any immune doctrine freeing foreign offending vessels-from Canadian jurisdiction when "passing through" Canadian rivers. On the contrary, the clauses of the Merchants Shipping Act, 1894, must be read as a grant of additional juridiction to that conferred by the Colonial Courts of Admiralty Act of 1890, which thus defines the jurisdiction of the Canadian Admiralty Courts: "The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise; and the Colonial Court of Admiralty may exercise such jurisdiction in like manner, and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations." And by the Imperial Act of 1861 a wide-world jurisdiction is conferred upon the High Court in England: "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."

We are glad to learn from the English *Law Times* that "Lord Loreburn has again made it abundantly clear that he does not intend to allow political opinion in any way to interfere with the appointment of justices of the peace. The sole qualification that will be considered will be the personal merit of the individual to be appointed, and the Lord Chancellor has unequivocally stated that he will not look beyond the question: Is this person respected in his locality and likely to administer justice impartially, with knowledge and with sympathy of the population at large? Had only this question been considered by those responsible for the appointments in the past, we should not have heard the complaints—complaints, we must admit, not without foundation—that the Benches throughout the country are largely filled by persons of one political feeling." After referring to some other matters, the writer continues as follows: "So long, at any

rate, as the present Lord Chancellor remains in office, political reward will not be given in the form of appointments to the Bench of justices."

These wholesome and patriotic views of the Lord Chancellor of England are well worthy of consideration by those responsible for judicial appointments in this Dominion. To make the Bench, whether judges or magistrates, a refuge for worn out politicians or clamorous partisans is to do a most serious injury to the country at large, and brings both the appointing power and the Courts into disrepute. It seems strange that even strong party men cannot see that good political capital is to be made by occasionally appointing to the Bench, or to the Senate, or such like responsible positions, the best men of the opposite stripe of politics. Politicians do not seem to realize that there is a large and powerful independent vote that takes notice of these things, and when the time comes, expresses its opinion with no uncertain sound. In other words, it pays politically to make good appointments.

One of our English exchanges refers to the suggestion that it would be desirable to institute a scheme for affording gratuitous legal advice to persons standing in need of it, but who are too poor to command such a luxury. The writer of the article questions the wisdom of such a step, and thinks that more harm than good would result from pandering to that trait in human nature which desires to get something for nothing; and points out some experiences in that direction in the administration of the poor laws and the giving of free medical advice. The latter has been officially said to have sown seed from which has grown up a harvest of pauperism. The recipient of such charity "soon learns to discover the whereabouts of various sentimental schemes, whereby he is able to throw off other burdens of manhood."

The new Workmen's Compensation Act in England seems to be bearing fruit in rather a novel way. It is said that some clergymen, in order to avoid liability thereunder, are proposing to engage choristers without any agreed remuneration, the suggestion being that they should receive an annual present. We doubt whether this will get over the difficulty, but it indicates one of the many evil results of class legislation. The Trades Dispute Act, recently passed, is equally objectionable. A legal writer says (post p. 00) that "the ancient maxim may now be rendered—the King and trade unions can do no wrong." The end is not yet, but it is coming, and when it does come the so-called "civilized world" will not be a very pleasant place to live in.

A writer in a recent number of *Law Notes* (p. 27), collects numerous authorities on the subject of "the attitude of equity toward the strike and boycott—use of the injunction." He sums up as follows:—

First: An injunction will not issue to prevent a strike, even though there may be a combination in order to secure a simultaneous cessation of work of a great number of employees, but will issue to prevent persons, not parties to the controversy, from inciting a strike of employees otherwise satisfied with their employment.

Second: There is a division of opinion as to the right of an injunction to prevent boycotts, some courts holding that it should properly issue to prevent the use of means to make effective the boycotts, while others have refused to grant injunctive relief.

Third: There would seem to be a tendency on the part of Courts to be a bit more liberal toward labor in the matter of combination than formerly, for the reason that changed industrial conditions, resulting in combination of capital, also require a combination in labor to insure equal ground to both.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

NULLITY OF MARRIAGE—DISSOLUTION OF ENGLISH MARRIAGE BY FOREIGN COURT ON GROUND NOT RECOGNIZED BY ENGLISH LAW—DOMICIL—CONFLICT OF LAWS—LEX LOCI CONTRACTUS.

Ogden v. *Odgen* (1907) P. 107 was a suit for a declaration of nullity of marriage. The defendant, an Englishwoman, had in England married a Frenchman; the marriage had subsequently been dissolved by a French Court for want of the consent of the husband's father which was necessary according to the law of the husband's domicil, but not according to English law. The wife then went through the ceremony of marriage in England with the plaintiff a domiciled Englishman, her French husband being still living. Deane, J., held that the ceremony was null and void and that the French decree could not be recognized as a valid dissolution of the first marriage.

ANNUITY—DIRECTION TO PURCHASE ANNUITY—DEATH OF ANNUITANT BEFORE ANNUITY PURCHASED—RIGHT TO VALUE OF ANNUITY.

In re Robbins, Robbins v. *Legge* (1906) 2 Ch. 648. A testator by his will directed his trustees out of the proceeds of the sale of his estate to purchase in the name of his wife a government annuity of £400 for her life. The wife survived the testator, but before probate had been granted of his will, she died. Her representatives claimed to be entitled to the value of the annuity at the time of the testator's death, and Eady, J., held that they were entitled to such a sum as would at the date of the testator's death, have purchased a government annuity of £400 for the life of the widow.

COMPANY—INTEREST ON MONEY BORROWED FOR CONSTRUCTION—PAYMENT OF INTEREST OUT OF CAPITAL.

In Hinds v. Buenos Ayres G.N. Tramways Co. (1906) 2 Ch. 654, Warrington, J., holds that where a limited company issues debentures to secure a loan for money to be expended on construction works, there is no general rule of law which would prevent the company paying out of their capital account the in-

terest which accrues on the loan pending the period of construction, and in the absence of any provision to the contrary in the articles of association it is competent for the directors of a company to provide that the interest shall be so paid as part of the cost of construction, and such payment cannot be prevented at the instance of the shareholders of the company.

PRINCIPAL AND AGENT—SECRET PROFIT BY AGENT—RIGHT OF AGENT TO COMMISSION—SEPARATE TRANSACTIONS—MISCONDUCT OF AGENT.

Nitedals Taendstikfabirk v. *Bruster* (1906) 2 Ch. 671 was an action by principals against their agent for an account. The defendant had been employed to sell the plaintiffs' goods on commission, and, while acting as the plaintiff's agent, he agreed not to act for any rival trader. In the course of his agency the defendant had misconducted himself, (1) by acting for a rival trader, and (2) by obtaining from customers, in some cases, a larger price for the plaintiffs' goods than that which he credited to the plaintiffs, he having retained the excess for his own use, but in other cases he had acted honestly. The plaintiffs claimed that by reason of his misconduct the agent had forfeited all right to any commission or renumeration whatever: and *Andrews* v. *Ramsay* (1903) 2 K.B. 635 (noted ante, vol. 40, p. 111), was relied on. Neville, J., however, held that where, as here, the transactions were separable, the misconduct of the agent only disentitled him to commission in respect of the transactions in which the misconduct took place, but had not the effect of depriving him of commission in respect of any transactions in which he had acted honestly.

WILL—ANNUITY—DIRECTION TO PAY OUT OF INCOME—ALTERNATIVE GIFT—CHARGE ON CORPUS—CONTINUING CHARGE ON INCOME.

In re Boden, Boden v. *Boden* (1907) 1 Ch. 132, was an appeal from Joyce, J., on the construction of a will whereby the testator gave all his residuary real and person estate to trustees upon trust for sale and conversion and investment and to hold the same on trust, in case he should leave any child living, 'out of the income'' of his residuary estate to pay his widow a sufficient sum to make up her income to £8,000 a year and in case he left no child or leaving any children they should all die

"then upon trust to pay her during her life such further sum as should make up the annual sum to £10,000." The testator left no child, and the income of his residuary estate proving insufficient to pay his widow £10,000 a year, the question submitted to the Court was whether the annuity was a charge on the corpus, and if not whether it was a continuing or cumulative charge on the income. It will be noticed that though the £8,000 was directed to be paid out of income, there is no such express direction as to the £10,000. Joyce, J., held that the annuity was a charge on the corpus of the residue and the deficiency in income must be made good out of the capital: but the Court of Appeal differed in opinion, the majority (Williams and Buckley, L.JJ.). came to the conclusion that the £10,000 as well as the £8,000 were intended to be paid out of income, and that the annuity was not a continuing or cumulative charge on the income, but that if the income proved insufficient the annuitant would have to bear the loss. Moulton, L.J., on the other hand thought it an indefensible addition to the will to import the clause as to payment out of income, into the clause relating to the £10,000, and that even if it were, as the majority of the Court held, payable only of income it constituted a continuing charge on the income until fully paid.

EXECUTORS—NO NEXT OF KIN—BENEFICIAL TITLE TO UNDISPOSED OF RESIDUE—LEGACIES TO EXECUTORS—CROWN—ESCHEAT.

In re Glukman, Atorney-General v. *Jefferys* (1907) 1 Ch. 171. Eady, J., holds that where a testator leaves a pecuniary legacy to his executors, that has the effect of depriving them of any beneficial interest in the undisposed of residue of his estate when there are no next of kin; and that in the case of several executors it is immaterial that the legacies are of unequal amounts. In such a case the residue escheats to the Crown.

WILL—CONSTRUCTION—GIFT TO SON AT THIRTY-FIVE—DISCRETIONARY TRUST FOR MAINTENANCE OUT OF INCOME.

In re Williams, Williams v. *Williams* (1907) 1 Ch. 180. In this case a testator gave all his residuary estate upon trust as to one third part to pay the income or such part thereof as his trustees should think fit to his son William for his advancement, preferment or benefit by equal instalments until he should attain thirty-five and then to pay him the corpus. The son who

at the testator's death was twenty-five years of age, claimed that the legacy was vested, and that he was entitled to immediate payment of the corpus; and Neville, J., following Jessel, M.R., *In re Parker*, 16 Ch. D. 44, held that he was so entitled.

COMPANY—PAYMENTS OUT OF COMPANY'S FUNDS FOR COST OF PROXY PAPERS AND CIRCULARS AND POSTAGE FOR SENDING AND RETURN—INFLUENCING NOTES—DIRECTORS—ULTRA VIRES.

In *Peel* v. *London & N.W. Ry. Co.* (1907) 1 Ch. 5 Warrington, J., decided that it is ultra vires for directors to have proxy papers prepared, together with a circular explaining the facts and the views of the directors, and asking the support of the shareholders at the meeting and defraying the cost thereof together with the postage for transmitting the same to shareholders and the postage for transmitting the proxies to the directors' and he granted an injunction restraining payments. But the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) unanimously overruled his decision and dismissed the action.

MASTER AND SERVANT—COMBINATION OF FIRMS—ENGAGEMENT OF SERVANT ON BEHALF OF COMBINATION OF FIRMS—COVENANT IN RESTRAINT OF TRADE—LIMIT OF SPACE—REASONABLENESS —INJUNCTION.

Leetham v. *Johnston* (1907) 1 Ch. 189 was a motion to restrain the defendant from entering the employment of any firm within the United Kingdom carrying on a business similar to the plaintiffs'. The plaintiffs were a combination of several separate firms which carried on business in conjunction. The defendant had been employed to act as agent on behalf of all the plaintiff firms and entered into a covenant that he would not enter the employment of any other person or firm doing the like business to the plaintiffs within the United Kingdom. The plaintiffs' business was very extensive and extended throughout the United Kingdom. The action was brought to restrain the defendant from committing a breach of his covenant. It was contended on his behalf that the covenant was unreasonable and oppressive and in restraint of trade, and that it was not competent for several firms to engage a servant. But Neville, J., though expressing disapproval of the state of the law held that there was nothing to prevent such an employment, and looking to the interests of the employers and the extent of their trade, he could not

say that the covenant was not necessary for their protection though he admitted it made it hard for the defendant to earn his living. Since the foregoing was written we learn that the decision has been reversed by the Court of Appeal on the ground that the restriction was too wide and therefore void.

MORTGAGE—PURCHASE BY FATHER OF INFANTS ENTITLED TO EQUITY OF REDEMPTION—LIABILITY OF FATHER TO ACCOUNT.

In *Griffith* v. *Owen* (1907) 1 Ch. 195 the facts are somewhat complicated, but the sum and substance of the case is simply this. The plaintiffs being infants became entitled under the will of their grandfather to the equity of redemption in certain freehold houses subject to the life estate of their mother. The mortgage being in default the father of the plaintiffs who in right of his wife was tenant for life, applied to the mortgagee and procured him to sell the property to him under the power of sale, at a sum which (as the Court found) was less than its actual value. The plaintiffs contended that owing to the defendant's relationship to the plaintiffs he must be taken to have purchased as their trustee and was liable to account to the plaintiffs for any benefit over and above the amount expended and subject to his wife's life estate, and Parker, J., granted the relief as prayed.

SOLICITOR—TRUSTEE AUTHORIZED TO CHARGE FOR PROFESSIONAL SERVICES AGAINST TRUST ESTATE—"PROFESSIONAL AND OTHER CHARGES FOR HIS TIME AND TROUBLE"—NON-PROFESSIONAL SERVICES BY SOLICITOR TRUSTEE.

In re Chalinder (1907) 1 Ch. 58. A solicitor was appointed a trustee of a will and was empowered thereby to charge the estate with "all professional and other charges for his time and trouble notwithstanding his being such executor and trustee." He rendered services of a non-professional character, which an unprofessional trustee might have rendered without the intervention of a solicitor, but for which a solicitor acting for a trustee would be entitled to recover against his client, but which the latter could not recover over against the trust estate. The question for Warrington, J., was whether this class of charges came under the category of "other charges for his time and trouble" and he held they did not. Perhaps the case is not of much moment in Ontario where the law provides for compensat-

ing all trustees and executors. The charges in question were therefore disallowed.

ADMINISTRATION—CONTINGENT LIABILITY OF ESTATE—RESERVATION OF ASSETS TO MEET CONTINGENT LIABILITIES—PARTLY PAID SHARES—SUMMARY APPLICATION.

In re King, Mellor v. *South Australian Land Mortgage Co.* (1907) 1 Ch. 72 was a summary application to the Court asking for a declaration of the Court that the personal representative of a deceased person was entitled to distribute his estate among the beneficiaries without reserving any sum to meet a possible contingent liability in respect of certain partly paid shares in a company belonging to the estate. The company was notified, but Neville, J., held that it was not competent for the applicant to make them parties to such an application, but he held that the applicant might obtain the necessary protection in administration proceedings and he gave the necessary leave to amend and apply again. At the same time he expresses the opinion that the Court would probably not direct any reservation of assets to meet such a liability where there was no personal liability on the part of the executors of the deceased in respect of the contingent claim.

WAY—EASEMENT—DEVISE—APPURTENANCES—COMMON OWNER—SEVERANCE BY DEVISE—USER OF EASEMENT—LOSS OF RIGHT BY CHANGE IN MODE OF USER OF EASEMENT—INJUNCTION.

Milner's Safe Co. v. *Great Northern and City Ry.* (1907) 1 Ch. 208 was an action by owners of an easement to restrain its use by co-owners in a way not contemplated. The facts were briefly as follows. A testator in 1832 devised several freehold houses "with their appurtenances." They were adjoining houses and had been built by the testator each of them being partly a warehouse and partly a dwelling. They all communicated with a passage, which was a cul de sac, and which ran along the backs of the houses into a side street, and this passage had always been used by the occupants of the houses. The testator did not devise the passage or make any express grant of it to his devisees or any person. The plaintiffs had become owner of one of the houses, and the defendants had become owners of some of the other houses higher up the passage than the plaintiffs' house. These houses the defendants had converted

into a railway station and were inviting the public to use the passage as a means of access to their station. Kekewich, J., held that the right of way passed to the devisees of the houses as an appurtenance, but that the defendants by altering their mode of user had forfeited their right, so that, under present circumstances, it was not exercisable at all; though semble on restoration of their premises to their original character, the right might revive. The case is also interesting as shewing the bearing of actual user, on the construction of an implied grant of an easement of way, as to its nature and extent.

WILL—CONSTRUCTION—BEQUEST ON CONDITIONS—FORFEITURE—"RESIDENCE"—"UNMARRIED"—INVALID CONDITION—RESON MARRIAGE.

In re Wright, Mott v. *Issott* (1907) 1 Ch. 231. A testator by his will bequeathed a leasehold house to trustees upon trust to permit his daughter Caroline to occupy the same free of rent, but subject to a proviso thereinafter mentioned "and to her residing on the said premises during her lifetime." In a subsequent part of the will was a provision that the use of the house was given to Caroline upon the express condition that Caroline should "remain single and unmarried," and, in case she married, there was a gift over. After the testator's death Caroline resided in the house until her marriage, she then went to reside with her husband and rented the house bequeathed to her, reserving one room which she furnished and used two or three times a week. The trustees applied for a construction of the will and for the judgment of the Court as to whether in the events which had happened there was a forfeiture of the bequest of the house. Kekewich, J., held that residing meant "personally residing" and therefore the condition as to residing had not been fulfilled. As to this point see *MacKlem* v. *MacKlem*, 19 Ont. 482, where it was held that a condition as to "actual occupation" was fulfilled by occupation by a caretaker. But the learned judge also held that as the subsequent condition in restraint of marriage was void and reading that into, or with, the condition as to residence for the purpose of construing that clause, "residing during her lifetime" must mean during her lifetime while she was capable of residing, namely, as a spinster; and therefore upon her marriage the condition as to residence ceased to apply, and consequently there was no forfeiture, which is certainly an ingenious way out of the difficulty.

VENDOR AND PURCHASER—CONTRACT—SALE BY TRUSTEE AT REQUEST OF BENEFICIARIES—ABSENCE OF POWER OF SALE—LEGAL ESTATE IN VENDOR.

In re Baker and Selmon (1907) 1 Ch. 238. This was an application under the Vendors and Purchasers' Act. The vendor was a trustee without any power of sale but having the legal estate. The contract stated that the vendor was selling as trustee under the trusts and powers vested in him. It also provided that the tenant for life would join in the conveyance for the purpose of releasing her life estate. On the examination of the title it turned out that the vendor had no express power of sale, but that he had entered into the contract at the written request of the tenant for life and all the other beneficiaries, so that he could compel them to join, and the question was whether the vendor was able to make a good title in accordance with the contract, and Eady, J., held that he was. He distinguished the case from *In re Bryant and Baningham*, 44 Ch.D. 218, where the vendors, finding that they had no present trust for sale, offered to procure a conveyance from the life tenant, a person not bound to convey at their request; and also from *In re Head*, 45 Ch.D. 310, when the offer to procure the concurrence of the beneficiaries was not made until after the contract had been repudiated by the purchaser, and the beneficiaries were even then not bound to concur; on the ground that here all the beneficiaries were concurring in, and could be compelled to carry out the sale.

VENDOR AND PURCHASER—RESCISSION BY VENDOR—REASONABLE GROUND—PURCHASER REFUSING TO ACCEPT INDEMNITY AGAINST CONTINGENT LIABILITY—NOTICE OF RESCISSION—"WITHOUT PREJUDICE."

In re Weston and Thomas (1907) 1 Ch. 244 is another case under the Vendors and Purchasers' Act. In the course of examination of the title it was discovered that the property was subject to a liability in a remote contingency. The vendor offered to give an indemnity against such liability which the purchaser refused to accept. The vendor's solicitor then, assuming to act under the conditions of sale, gave the purchaser notice of rescission of the contract, but the notice was stated to be "without prejudice." In these circumstances Eady, J., held (1) that the refusal of the vendor to accept an indemnity against

a contingent incumbrance no matter how small the amount, or remote the contingency was not a "reasonable ground" for rescission by the vendor, because the purchaser was entitled to insist that the incumbrance should be discharged. (2) He also held that the notice of rescission being given "without prejudice was null and void.

CONSTRUCTION—CONVEYANCE OF LAND—RESERVATION OF ALL "MINES AND VEINS OF COAL"—PROPERTY IN SUBSOIL—PAYMENT OF RENT—MISTAKE—ESTOPPEL.

In *Batten Pooll* v. *Kennedy* (1907) 1 Ch. 256 the plaintiffs claimed to recover rent alleged to be due in respect of an alleged license to make an underground road for coal mining purposes. The facts were that the plaintiffs were owners of the surface rights of the land in question under a conveyance which had excepted and reserved "all veins and mines of coal in or under" the land conveyed. The defendants were owners of the minerals thus reserved; and under a mistake as to their rights had paid for some years to the plaintiffs rent, in the belief that they were bound to do so under a license from the plaintiff to work the coal made by the plaintiffs' predecessors in title in 1822, whether to defendants' predecessors in title or not did not appear. The defendants had for the purpose of working the coal made underground roads, which pierced not only the veins of coal but also the adjacent strata and had paid rent to plaintiffs from 1887 to 1903. Warrington, J., held that, as the owners of the minerals reserved, the defendants had, independently of any license granted by the plaintiffs' predecessors in title, a right to make the roads in question for the purpose of their mining operations, and that they were not estopped, by reason of the payments which they had made, from disputing the right of the plaintiffs as landlords of the road in question. Such payments the learned judge held to be voluntary and made under a supposed legal liability which created no estoppel against the defendants.

MARRIED WOMAN—RESTRAINT ON ANTICIPATION—RULE AGAINST PERPETUITIES—WILL—CONSTRUCTION.

In *Re Gome, Gome* v. *Tennent* (1907) 1 Ch. 276 the construction of a will was in question. The testator directed his trustees to hold a sum of £500 and pay the income to his daughter Sarah for life, and after her death upon trial for such child

or children of Sarah, or such child or children of a son or daughter of Sarah, who should die before her as should if a son attain 21, or if a daughter should attain that age or marry. "And as to the share or shares of any girl or girls for her or their separate use without power of disposing of the income or capital thereof otherwise than by will." Two daughters were born to Sarah in the testator's lifetime and still survived. The question was whether as to them the restraint against anticipation was valid, or whether by reason of the possibility of there being others of the class born after the testator's death it was void in toto. Warrington, J., held that the class was severable, and that the restraint against anticipation was valid as to the daughters born in the testator's lifetime. It may be remarked that Jessel, M.R., had held *In re Ridley*, 11 Ch.D. 645, without considering the question of severance, that such a restraint would be invalid where it applied to a class some of whom might be born after the testator's death.

TENANT FOR LIFE—REMAINDERMAN—RETURN OF CAPITAL OUT OF PROFITS—INCOME OR CAPITAL.

In re Piercy, Whitwham v. *Piercy* (1907) 1 Ch. 289 although turning to some extent on the effect of a statute of which there is no Ontario counterpart, may nevertheless be noted as following in the principle case of *Bouch* v. *Sproule* (1887) 12 App. Cas. 385 (noted ante, vol. 22, p. 334) viz., that as between tenant for life and remainderman of shares in a joint stock company, all payments made out of profits the tenant for life is entitled to as income, even though they are purported to be made as a return of capital, unless the same have been first validly capitalized by the company.

MORTGAGE—SALE—SURPLUS PROCEEDS OF SALE OF MORTGAGED REALTY—TRUST IN FAVOUR OF MORTGAGOR HIS HEIRS OR ASSIGNS—REALTY OR PERSONALTY—LUNACY OF MORTGAGOR.

In re Grange, Chadwick v. *Grange* (1907) 1 Ch. 313. In this case a mortgage of land provided that the mortgagee might sell the mortgaged property, and should pay the surplus proceeds of the sale to the mortgagor "his heirs or assigns." After the mortgage was made the mortgagor became a lunatic not so found, and continued until his death in 1906 a lunatic. The mortgaged property was sold in 1900 under the power of sale, and there was a surplus. The question was whether it was to

be regarded as realty or personalty. Parker, J., held that the surplus proceeds were personalty and must be so treated notwithstanding the trust for the "heirs or assigns" of the mortgagor.

CRIMINAL LAW — BIGAMY—OFFENCE COMMITTED ABROAD—NO AVERMENT THAT ACCUSED WAS A BRITISH SUBJECT—OFFENCES AGAINST THE PERSON ACT, 1861—(24 & 25 VICT. c. 100), s. 57—(CR. CODE, s. 307(*b*)).

The King v. Audley (1907) 1 K.B. 383 was a prosecution for bigamy, the offence had been committed abroad, and the indictment did not allege that the defendant was a British subject. On a case reserved whether this omission was material the Court for Crown Cases Reserved (Lord Alverstone, C.J., and Grantham, Lawrence, Bigham and Bucknill, JJ.) held that it was not.

CRIMINAL LAW—PUBLISHING ADVERTISEMENTS FOR SALE OF OBSCENE BOOKS—NEWSPAPER PUBLISHER—AIDING AND ABETTING SALE OF OBSCENE BOOKS, ETC.

The King v. *De Marny* (1907) 1 K.B. 388. The defendant was indicted for selling and publishing, or causing and procuring to be sold and published obscene books, papers and photographs. He was a publisher of a newspaper and had been warned by the police that certain advertisements published in his paper were for the publication and sale of obscene books, etc., he nevertheless continued to publish them. The police inspector wrote to the addresses given and received in return from the advertisers obscene books, etc. On a case reserved as to whether defendant had taken part or aided and abetted in the publication of the obscene books as charged, the Court for Crown Cases Reserved (Lord Alverstone, C.J., and Grantham, Lawrence, Bigham and Bucknill, JJ.) held that he had, and his conviction was affirmwas affirmed.

GAMING—LOTTERY—GRATUITOUS DISTRIBUTION OF MEDALS BEARING NUMBERS—PRIZES AWARDED TO ARBITRARILY SELECTED NUMBERS—NOTIFICATION OF WINNING NUMBERS IN NEWSPAPER—POSSIBILITY OF PRIZE WITHOUT PAYMENT FOR CHANCE —GAMING ACT, 1802 (42 GEO. III. c. 119), s. 2 (CR. CODE s. 236).

Wills v. *Young* (1907) 1 K.B. 448. In these days of keen competition it is a matter of common observation, what curious

schemes and devices are from time to time resorted to by newspapers for the purpose of increasing their circulation, and such a scheme was in question in this case. The defendants were proprietors of a weekly newspaper and distributed to the public promiscuously a number of medals each bearing a different number and the words "keep this it may be worth £100. See the weekly Telegraph to-day." Numbers were arbitrarily selected for prizes by the defendants and the winning numbers were published weekly in the defendants' paper. The object of the scheme was to induce the public to buy or inspect the paper. But information as to the winners could be obtained without any payment, or sending in any coupon. The defendants were indicted for holding and carrying on a lottery within the Gaming Act, 1802, s. 2 (see Cr. Code s. 236), and the Divisional Court (Lord Alverstone, C.J., and Darling and Ridley, JJ.) held that it was, and that defendants should be convicted. Darling, J., however, says that he would not be prepared to hold that a gratuitous distribution of chances for prizes, without payment by anyone, would be a lottery, but in the present case he holds that the chances are paid for by the general body of purchasers of the paper, although individual prize winners possibly pay nothing.

NEWSPAPER OFFERING TO GIVE ADVICE—CONTRACT—CONSIDERATION—BREACH OF DUTY—DAMAGES—REMOTENESS—FRAUD OF PERSON RECOMMENDED.

De la Bere v. *Pearson* (1907) 1 K.B. 483 is another case which ought to prove of interest to newspaper men. In this case the defendant was also a newspaper proprietor, and in his paper announced that the city editor would answer inquiries from readers of the paper, desiring financial advice. The plaintiff wrote asking the city editor to recommend a "good stock broker." The city editor in good faith handed the letter to one Thompson who wrote to say that the letter had been handed to him by the editor and that he did most of his business and would be glad to act for the plaintiff. Thompson was not a member of the stock exchange, but what in this country would probably be called "a curbstone broker." He had done business for the city editor, and was known not to be a regular broker, but unknown to him, he was an undischarged bankrupt which by inquiry could have been easily ascertained. The plaintiff confidingly sent to Mr. Thompson £1,400 for investment, and Mr.

Thompson promptly appropriated the money to his own use, and the plaintiff now claimed to recover his loss from the newspaper proprietor. The defendants contended that the defendants' negligence was not the immediate cause of the loss but the fraud of Thompson, but Lord Alverstone, C.J., who tried the action held that the defendants had been guilty of a breach of duty to take reasonable care in recommending a broker, and were liable to the plaintiff for the whole loss sustained by him.

SHIP—CHARTER PARTY—DEMURRAGE—LAY DAYS—ARRIVAL AT PLACE OF LOADING—OBLIGATION OF MASTER TO GO TO BERTH NAMED BY CHARTERER.

Leonis SS. Co. v. *Rank* (1907) 1 K.B. 344 was an action by shipowners for demurrage. The charter party provided that the charterers should ship a cargo and that the time for loading should commence to count twelve hours after written notice had been received from the master that the ship was in readiness to receive a cargo. The ship arrived at the port of lading and anchored in a river within the port a few ship's length off the pier, and written notice was given of its readiness to receive cargo. The place where the ship was anchored was not the usual loading place, but a possible place. The charterers required her to be brought alongside the pier, but owing to the crowded state of the port she was delayed in getting a berth there. Channel, J., held that the twelve hours did not begin when the notice of readiness to load was given by the master, but from the time the vessel got a berth at the pier.

TRADE UNION—RAISING FUND FOR MAINTENANCE OF MEMBERS OF PARLIAMENT—RULES OF UNION—LEVYING CONTRIBUTIONS—INJUNCTION—JURISDICTION OF COURT—TRADE UNION ACT, 1874, S. 4—(R.S.C. C. 125, S. 4).

Steele v. *South Wales Miners' Federation* (1907) 1 K.B. 361. This was an action by a member of a trade union for an injunction to restrain the defendants the union, from levying contributions from the plaintiff for a fund to be applied in the support of a member of Parliament. The rules of the union provided that one of its objects was to provide funds wherewith to pay the expenses of returning and maintaining representatives to Parliament, but no provision was made for raising such funds. A resolution in favour of a general contribution

from all the members was passed and the officials of the union proceeded to levy it. The plaintiff claimed that, in the absence of rules empowering such levy to be made, it was ultra vires and illegal and should be restrained by injunction. The action was tried in a County Court and dismissed, and the Divisional Court (Darling and Phillimore, JJ.) affirmed the judgment on the ground that although the levies might be irregular as not being provided for by the rules, yet as the purposes for which the levies were made were authorized by the rules, they were not illegal or ultra vires; and therefore the Court ought not to interfere.

DEFAMATION—LIBEL—PRIVILEGED OCCASION — PUBLICATION TO CLERKS OF COMPANY—REASONABLE AND ORDINARY COURSE OF BUSINESS.

In *Edmondson* v. *Birch* (1907) 1 K.B. 371 the Court of Appeal (Collins, M.R., and Cozens-Hardy and Moulton, L.JJ.) have followed *Boxsius* v. *Goblet* (1904) 1 Q.B. 842 (see ante, vol. 30, p. 392), which case it may be remembered explained and qualified *Pullman* v. *Hill* (1891) 1 Q.B. 524 (see ante, vol. 27, p. 236). In the latter case it had been held that the publication of a defamatory letter written by a wine merchant, to his clerk for the purpose of copying it was not privileged and rendered the merchant liable to the person defamed; but in *Boxsius* v. *Goblet*, it was held that publication to a clerk in the ordinary course of business was privileged, in that case the defamatory matter being contained in a letter written by a solicitor on behalf of his client in the ordinary course of business. In the present case the defendants were a company in London having business relations with a company in Japan, and the Japan company employed the plaintiff and it was understood that they should write to the London company to ascertain if they approved of the engagement. The London company's manager telegraphed back in cipher, "have no dealings with Edmondson give notice of dismissal." This telegram was copied into the defendant company's cable book together with a translation of it by one of the defendant company's clerks. The case was tried by Lawrence, J., and jury, and a verdict and judgment were given in favour of the plaintiff. The defendant appealed and moved for judgment, or for a new trial, and the Court of Appeal held that the letter being written in the ordinary course the publication to the defendant's clerks

was privileged, and therefore no action lay. But it may be remarked that Collins, M.R., points out, that the language used may be so defamatory, and so far in excess of the occasion, as to be evidence of malice, and shew that the publication to a clerk was not a use but an abuse of the privilege. Moulton, L.J., thus summarizes the law on this point: If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business.

PRACTICE—LIBEL—PLEADING—DEFENCE OF FAIR COMMENT—PARTICULARS.

Digby v. *Financial News* (1907) 1 K.B. 502 was an action against a newspaper proprietor for libel, which arose out of the following circumstances. The plaintiff advertised for a partner with £250, to complete the formation of a syndicate. Carruthers, a correspondent of the defendants' paper, answered the advertisement and received certain papers in reference to the syndicate, which he afterwards forwarded to the defendants' paper, in which was published an article in a satirical verse commenting on the advertisement and the papers furnished by the plaintiff, as to the purpose for which the money was alleged to be required. This constituted the libel complained of. The defendants' pleaded that in so far as the words consist of statements of fact, the same are in their ordinary signification true in substance and, in fact, and as far as they consist of comment, they were a fair comment on a matter of public interest. The plaintiff claimed that this defence amounted to justification and applied for particulars as to whether the defendants alleged that any of the statements made in the particulars and documents furnished by the plaintiff were untrue, and if so, which of them. The defendants, on the other hand, contended that the defence was simply one of fair comment. The Master granted the plaintiff's application and his order was affirmed by Bucknill, J., but the Court of Appeal (Collins M.R. and Cozens-Hardy and Farwell, L.JJ.,) agreed that the order should not have been made and that the defence only amounted to one of fair comment and could not be regarded as one of justification.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT.

Burbidge, J.] [March 18.

DOMINION OF CANADA *v.* PROVINCE OF ONTARIO.

Disputed territory—Indian title—Moneys paid by Dominion for surrender of—Contribution by Ontario.

1. The jurisdiction that the Court has of controversies between the Dominion of Canada and a Province of Canada, or between two Provinces, does not authorize the court to decide the issue in accordance only with what may to it seem fair, and without regard to the principle of law applicable to the case.

2. At the time when the North West Angle Treaty No. 3, between Her late Majesty the Queen and the Salteaux Tribe of the Ojibeway Indians was entered into, the boundaries of the Province of Ontario were unsettled and uncertain. The lands described in the treaty formed part of the territory that the Hudson's Bay Company had claimed and had surrendered to the Crown. The surrender embraced all lands belonging to the company or claimed by it. That of course did not affect Ontario's title to such part of the lands claimed by the company as were actually within the Province. But on the admission of Rupert's Land and the North Western Territory into the Union, the Government of Canada acquired the right to administer all the lands that the company had a right to administer. And with respect to that portion of the territory which the company had claimed, but which was in fact within the Province of Ontario, the Dominion Government occupied a position analagous to that of a bonâ fide possessor or purchaser of lands of which the actual title was in another person. The question of the extinguishment of the Indian title in those lands could not with prudence be deferred until such boundaries were determined. It was necessary for the peace, order and good government of the country, that the question should be settled at the earliest possible time. The Dominion authorities held the view that the lands belonged to the Dominion, and that they had a right to administer the same. In this they were in a large

measure mistaken, but no doubt the view was held in good faith. They proceeded with the negotiation of the treaty without consulting the Province. The latter, although it claimed the lands to be surrendered, or the greater part thereof, raised no objection and did not ask to be represented in such negotiation. By this treaty the burden of the Indian title was extinguished. In the case of *The St. Catharines Milling and Lumber Company* v. *The Queen* (14 App. Cas. 60), in which it was decided that the ceded territory within the Province of Ontario belonged to the Province, subject to the burden of the Indian title therein, Lord Watson, delivering the judgment of the Judicial Committee of the Privy Council, and dealing with the question of the liability of the Province to contribute to the Dominion in respect to the obligations incurred by the Dominion in obtaining the surrender of the Indian title, expressed the following opinion:—

"Seeing that the benefit accrues to her, Ontario must of course relieve the Crown and the Dominion of all obligations involving the payment of money, which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government."

Held, following that expression of opinion, that the Province of Ontario is, in respect of the obligations incurred by the Crown, and the Dominion under the said treaty, which involve the payment of moneys, and which are referable to the extinguishment of the Indian title in the lands described therein, liable to contribute to the payments of money made by the Dominion thereunder in the proportion that the area of such lands within the Province bears to the whole area covered by the treaty.

3. While the question of the true boundaries of the Province of Ontario was in course of determination, the Dominion authorities, under an agreement for a conventional boundary, administered a part of the territory in dispute, and derived revenues therefrom, for which the Province in this action, set up a counterclaim.

Held, that the Province could not maintain its counterclaim for the moneys so collected by the Dominion without submitting to the enforcement of the equity existing in favour of the Dominion in respect of the obligations incurred in obtaining a surrender of the Indian title.

Semble: The fact that a part of the benefit arising from the surrender of the lands mentioned in the treaty accrued to the

Province of Ontario is not of itself, and without other considerations, sufficient to make the Province liable to contribute to the Dominion a proportionate part of the payment made in pursuance of the obligations incurred by the Crown under the treaty.

If the Parliament of Canada should appropriate, and the Government of Canada should expend public moneys of the Dominion for either Dominion or Provincial purposes, with the result that a Province was benefited, there being no agreement with the Province or request from it, no obligation would arise on the part of the Province to contribute to such expenditure. The principle stated would apply as well to expenditures made by a Province with the result that the Dominion, as a whole, was benefited. In all such cases the appropriation and expenditure would be voluntary, and no obligation to contribute would arise.

Newcombe, K.C., *Hogg*, K.C., and *Roy*, for the Dominion; *Irving*, K.C., *Shepley*, K.C., and *White*, for Ontario.

Province of Ontario.

COURT OF APPEAL.

Full Court.] IN RE J. D. SHIER LUMBER CO. [March 21.

Assessment—Timber licenses—Lumber camps—Business tax—Slides and dams.

This was a case referred by the Lieutenant-Governor in Council under sec. 77 of the Assessment Act in respect to assessments. The company are manufacturers of lumber, etc., and hold licenses to cut timber on Crown lands for 1906 and 1907. They were assessed in the present year in the Township of Lawrence upon their said licenses to cut timber, and upon their lumber camps, and upon business tax at the said camps, and upon slides and dams. The company do not own any land nor have they any office or mills in the said township, nor do they carry on any business therein, but cut timber therein, and haul and float it to their mills at Bracebridge, where they own a mill and

factory and which is their chief place of business and where they are assessed on such factory and mill, and also on business.

The company claim that there was no jurisdiction to make such assessments on the ground that timber licenses and timber are not assessable, and that camps are not land, their servants and employees being on Crown lands by license to cut and carry away timber, and because by reason merely of maintaining such camps, they are not assessable for business tax in respect thereof, and because such dams and slides are mere temporary arrangements for conveying timber down the rivers and are on Crown lands.

Held, by a majority of the Court that:

1. The holders of timber licenses are not liable to be assessed thereon, such licenses not coming within the meaning of real property as used in the 5th section of the Assessment Act, and also because there is nothing to remove the land from the category of property of the Crown exempt from taxation.

2. Lumber camps are not assessable for they are mere temporary constructions and are removed from time to time from one part of the limits to another, so that it is quite possible they may be in one municipality one day and in another the next. There seems to be no ground on which they could be treated as liable to taxation.

3. The owners of lumber camps are not assessable for a business tax under the conditions mentioned with respect to the camps only. A reference to the provisions of sec. 10, under which a business tax imposed shews that they have no application under the circumstances, stated in the case. Moreover, the holders of the licenses are not using land which is subject to taxation for the purposes of any such business, while it seems from sec. 10 that the land occupied or used must be land subject to taxation.

4. Slides and dams are not assessable under the conditions mentioned. They are temporary structures erected upon Crown property; they may or may not be situate on the limits covered by the licenses and they are used by all persons for the floating down of their logs and timber, and when no longer required are abandoned. There does not appear to be any ground for assessing them under the Act.

E. D. Armour, K.C., and *Mickle*, for company. *G. G. Mills*, for township.

HIGH COURT OF JUSTICE.

Mabee, J., Trial.] CRABBE *v.* LITTLE. [March 21.

Sale of land—Requisitions—Right of vendor to rescind—Waiver of right by negotiations—Conveyancing practice.

Contracts for sale of lands with usual provision that "if any objection or requisition be made by the purchaser which the vendor should be unable or unwilling to comply with, the vendor should be at liberty, by notice in writing, to rescind the agreement." In these cases requisitions on title were made, to some of which the vendor's solicitor replied, to the effect that they related to deeds more than twenty years old, and to facts recited in the said deeds, and that the vendor had been in uninterrupted possession since 1876, and a draft deed was enclosed. He also stated that the vendor was unwilling to go to expense as regards certain requisitions which had not been answered. The purchaser's solicitor insisted that the latter requisitions must be answered, and other negotiations took place between them, and finally the vendor served notice cancelling the contract.

Held, that the vendor's solicitor by attempting to answer the requisitions had lost his right to rescind, which right was waived by the communications between the parties both written and verbal after the delivery of the requisitions. It is on account of this state of the law that the practice has grown up that where a vendor once embarks upon an attempt to comply with requisitions, or remove objections, he reserves to himself the benefit of the right to rescind later on during the negotiations: this, however, had not been done in this case.

Jennings, for plaintiffs. *McCullough* and *Frazer*, for defendants.

Riddell, J.] [April 8.

ERRINGTON *v.* COURT DOUGLAS No. 27 C.O.F.

Division Court jurisdiction—Finding of judge—Interference with—Judge giving himself jurisdiction by error—Motion for prohibition is not an appeal.

On a motion for prohibition to a Division Court judge on

the ground that the defendant declined to give any evidence or enter into any defence on the merits because the plaintiff had not shewn that he had taken the various appeals to the domestic forum provided for by the conditions of a benefit society and so established jurisdiction in the Division Court.

Held, 1. The Division Court had jurisdiction and that the question to be decided was not, in what Court the action should be brought? but can such an action succeed in law? And that then a High Court judge had no right to dictate to the Division Court judge.

2. A finding that the plaintiff "had exhausted every possible means of redress in the domestic forum," could not be interfered with as a motion for prohibition was not an appeal and that the Division Court judge had not given himself jurisdiction by an error but that any mistake he may have made was made in a matter within his jurisdiction to try, and the motion was dismissed with costs.

Proudfoot, K.C., for the motion. *Hugh Morrison*, contra.

Cartwright, Master.] [April 9.

RIGHT OF WAY MINING CO. *v.* LAROSE MINING CO.

Inspection of property adjacent to that on which trespass committed—Mining land—Risk of losing evidence.

In an action for damages and on account of ore or minerals removed by the defendants from the property of the plaintiffs, in which a trespass on part of plaintiffs' property was admitted by the defendants.

An order was made before the delivery of the statement of claim, allowing the plaintiffs to inspect the defendants' property adjacent to that of the plaintiffs, so that they might state their case according to the facts, and because the evidence necessary to ascertain how much ore had been removed, might be lost by delay.

Middleton, for the motion. *Holden*, contra.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] GALBRAITH *v.* SCOTT. [Feb. 26.

Chattel mortgage—Affidavit for renewal—Words having same meaning as those in form prescribed—Ownership of off-spring of mares covered by mortgage—Removal of chattels from division when mortgage registered—Subsequent purchaser—R.S.M. 1902, *c.* 11, *ss.* 20, 29.

The three plaintiffs, respectively, had purchased from one Brown four colts the off-spring of two mares upon which Brown had given the defendant a chattel mortgage, the description concluding with the words "and also the increase from the mares." The plaintiffs were purchasers of the colts for value and received delivery of them from Brown without any notice of the defendant's claim. Defendant having afterwards seized and removed the colts under his mortgage, plaintiffs replevied them.

Held, that the common law principle "partus sequitur ventrem" applied and that the legal estate in the colts was in the defendant even without the special provisio to that effect in the mortgage. The case was not analogous to that of a mortgage given to cover future acquired chattels, a title to which might be obtained by a purchaser for value without notice before the mortgagee exercised any act of possession.

Dillarn v. *Doyle*, 43 U.C.R. 442, and *Temple* v. *Nicholson*, Cassels Sup. Ct. Digest, 114, followed.

Held, also, that the expression "kept on foot" in the defendant's affidavit for renewal of the mortgage pursuant to s. 20 of the Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, meant the same thing as the words "kept alive" used in that section, and the statute was sufficiently complied with: *Emerson* v. *Bannerman*, 19 S.C.R. 1.

The plaintiff Roper had removed the animal purchased by him from the division in which the chattel mortgage was registered to another division where he had it for over a year before its seizure by defendant. A certified copy of the mortgage had, however, been registered in the latter division, pursuant to s. 29 of the Act, within the required time.

Held, following *Hulbert* v. *Peterson,* 36 S.C.R. 324, that the "subsequent purchaser" mentioned in s. 29 must be one who purchased after the expiration of the time limited for registration in the division to which the goods had been removed, and that the mortgage was valid as against him as well as the other plaintiffs.

Appeal from verdicts in the County Court for plaintiffs allowed with costs and judgments for defendant ordered to be entered in the County Court with costs.

Bradshaw and *Geo. Paterson* (Deloraine), for plaintiffs. *Robson* and *Blackwood,* for defendant.

Full Court.] OTTO *v.* CONNERY. [March 7.

Garnishment—Attachment of money in hands of County Court clerk to which debtor entitled—R.S.M. 1902, *c.* 38—*Equitable execution in County Court.*

Held. that money paid into a County Court for the benefit of one of the parties to a suit in that Court are not attachable in the hands of the clerk of the Court by garnishee process at the suit of a creditor of such party. *Dolphin* v. *Layton,* 4 C.P. D. 130, followed in preference to *Bland* v. *Andrews,* 45 U.C.R. 431. *Ross* v. *Goodier,* not reported, decided by CUMBERLAND, Co. J., in 1894, approved.

Quære, whether the money could not be reached by way of charging order or equitable execution as by the appointment of a receiver.

Thornburn, for plaintiff. *Crichton,* for defendant and garnishee.

Full Court.] [March 7.

COPELAND-CHATTERSON CO. *v.* HICKOK.

Contract—Consideration—Injunction to restrain breach of agreement.

Appeal from judgment of MACDONALD, J., granting an injunction to restrain defendant from carrying on business in competition with the plaintiff company in violation of an agreement signed by defendant that he would not, within one year

after the termination of his employment with the company, engage or be interested in any business or work within Canada or Great Britain in competition with the business of the company. Defendant had been for some months employed as a salesman in the Winnipeg office of the company, when the assistant general-manager came from Toronto, and, acting on instructions from the general-manager, placed the defendant in temporary charge as manager of the Winnipeg office and procured defendant to sign the agreement in question, telling him the company wanted it signed. No change was made or agreed to be made in defendant's salary or in the terms of his hiring. A few months afterwards defendant resigned his position and entered into business of a character similar to that of the plaintiffs.

Held, that there was no sufficient legal consideration for defendant entering into the agreement and that it was, therefore, not binding upon him.

Appeal allowed with costs.

Coyne, for plaintiffs. *Hugg* and *Wemyss*, for defendant.

Full Court.] [March 9.

MANUFACTURERS' LIFE INSURANCE CO. *v.* ROWES.

Promissory note—Consideration—Liability of insured for premium on life insurance when policy voided for non-payment.

Appeal by plaintiffs from verdict of County Court judge for one-fourth of the amount of defendants' promissory note for the first year's premium on a policy of life insurance issued to him by the plaintiffs. It was a condition of the policy that it should be utterly void if any note given for a premium should not be paid when due, but the note should nevertheless be paid; and in his application for the insurance defendant had agreed that he would accept the policy when issued and pay the first year's premium thereon.

Held, that defendant was liable for the full amount of the note, as it had been given for valuable consideration, and to permit him to pay for only three months' insurance, would be, in effect, to make a new contract between the parties. *Manufacturers' Life* v. *Gordon*, 20 A.R. 309, followed. *Royal Victoria Life* v. *Richards*, 31 O.R. 483, distinguished.

Daly, K.C., and *Crichton*, for plaintiffs. *McMurray*, for defendant.

Full Court.] [March 9.

GRIFFITHS *v.* WINNIPEG ELECTRIC RY. CO.

Jury trial—Action for damages caused by alleged negligence.

Appeal from judgment of MATHERS, J., noted, ante, p. 177, ordering trial of this action by a jury, dismissed with costs.

Manahan, for plaintiff. *Aikins*, K.C., and *Laird*, for defendants.

Full Court.] MOORE *v.* SCOTT. [March 9.

Promissory note—Holder in due course—Rescission of contract —Plea of fraud—Amendment—Restitutio in integrum.

Appeal from judgment of MATHERS, J., noted, ante, p. 174, dismissed with costs.

Aikins, K.C., and *J. F. Fisher*, for plaintiff. *A. J. Andrews*, and *Burbidge*, for defendants.

Full Court.] [April 8.

NAGY *v.* MANITOBA FREE PRESS CO.

Slander of real estate—Publication of statement that house haunted—Damages.

Appeal from judgment of MacDonald, J., noted ante, p. 118, allowed with costs, Perdue, J. A., dissenting.

Per RICHARDS, J.A.—The members of the Court should, as educated men, assume that there are not such things as ghosts and therefore that the statement published by defendants was necessarily false. It is necessary, to enable the plaintiff to succeed, that she should prove malice in the strict sense of the word. It should be presumed that the reporter and the editor who were responsible for the publication of the article, as educated men, knew that the statement was false, and therefore, had no reasonable justification or excuse for publishing it. They thus rendered their employers, the company, liable in damages for the natural results of such publication even though such results were not foreseen by them.

The evidence shewed that the plaintiff lost a sale of the house in consequence of the publication and that the house, being

vacant, was damaged by crowds resorting to it on account of the report that it was haunted.

Per PHIPPEN, J.A.—I agree that the article was untrue, that it caused actual damage to the plaintiff and that such damages were the logical result of the publication. The article directly referred to the plaintiff's premises, it falsely imputed a condition which naturally resulted in loss. It was not published on any public or privileged occasion nor did it deal with a matter in which the defendants were specially interested. To my mind, as against the plaintiff, it was wrongful and as such actionable, apart altogether from any consideration of actual malice. It falls within the principle of *Riding* v. *Smith*, 1 Fraser (Court of Sessions Cases, Scotland) 327, rather than within that other class of cases where, on the ground of public policy, the Courts have held honest statements to be lawful, although occasioning damage to the innocent.

Per PERDUE, J.A.—In such a case the plaintiff must prove that the statement is false, that it was published maliciously and that special damage resulted.

The statement can only be actionable if it was intended to be believed and was believed by some person who was influenced by it to the detriment of the plaintiff: *Longridge* v. *Levy*, 2 M. & W. at p. 531. But, if it was so repugnant to common sense and common knowledge that no proof of its untruth would be necessary, it is difficult to see how anyone could have been deceived by it. The plaintiff failed to shew that the statement complained of was wrongful and was made with the knowledge that it would cause, or was likely to cause, injury to the plaintiff, or that the defendants, in publishing it, intended or contemplated any injury to the plaintiff or her property, and without such evidence the plaintiff should not recover. Intention to injure must be established either directly or by reasonable inference to support such an action: *Quinn* v. *Leathen*, (1901) A.C. 495, at p. 524; *Read* v. *Friendly Society*, (1902) 2 K.B. 732, at p. 739. It is clear that the statement was only published as an item of news, with no intention to do any wrong to the plaintiff, and without any idea that the publication would cause any damage to the plaintiff's property.

The plaintiff also failed to prove that she sustained special damage resulting directly from the publication complained of. The finding of the trial Judge on this point and as to those parts of the evidence which should be believed or disbelieved should not be interfered with. It must be shewn than an actual

sale was prevented. Evidence of opinion to shew a general depreciation of value caused by the statement is not sufficient in such a case where no lasting injury was shewn to have been caused.

The Court ordered that the judgment in the King's Bench for defendants should be set aside and that judgment should be entered there for the plaintiff for $1,000, with the costs of the action.

O'Connor and *Blackwood*, for plaintiff. *Hudson* and *Howell*, for defendants.

KING'S BENCH.

Mathers, J.] EMERSON *v.* WRIGHT. [March 8.

Receiver—Duty to deposit trust moneys in bank promptly—Municipal treasurer allowing discount on taxes not paid within time fixed—Negligent omission of taxes from roll—Costs.

The defendant was appointed receiver of the Town of Emerson under legislation conferring on him all the powers and authority previously exercised by the mayor and council and by the clerk, treasurer, assessors and collector under the Municipal Act, the mayor and council having resigned in consequence of the town being unable to meet its liabilities. Defendant held the said office from 1894 until 1901, when his appointment was cancelled, and the plaintiff Unsworth appointed receiver in his place. An advisory board of three, was also appointed by Order in Council under a statute to assist the new receiver. In carrying on the affairs of the town and providing money for the support of the schools, the defendant during his term of office frequently had to borrow money on overdrafts from a local bank on his personal guaranty, and to pay interest on such overdrafts. It was also his duty to collect taxes.

This action was brought for the recovery of money alleged to be due from defendant to the town, and for an account of all moneys received, or which should have been received, for the town by him, and for moneys alleged to have been improperly disbursed by him as such receiver. The statement of claim con-

tained a great many charges of improper and fraudulent conduct on the part of the defendant, but the evidence at the trial, was entirely confined to the questions of his liability, (1.) for interest which he had paid on overdrafts at the bank in excess of that which would have been payable if he had from time to time deposited the cash received promptly.

2. For the sum of $168.00, which he had allowed as discounts on taxes paid in the year 1897, after the 15th of December, after which date no discounts were legally allowable; and

3. For a sum of $447.20, taxes dropped from the tax rolls through the error or negligence of the defendant.

Held, 1. Defendant should have, at least once a week, deposited in the bank all town moneys in his hands, and was liable for any excess of interest paid on overdrafts, that would not have been charged if such deposits had been made.

2. Defendant was not liable for the discounts allowed, as he had previously consulted with the municipal commissioner, the member of the Government charged with municipal matters, and had received his permission to use his own discretion in the matter, and the allowance of the discounts had been ratified by the plaintiff Unsworth, and the advisory board, with full knowledge of all the facts.

3. Defendant was not liable for the amount of the taxes he had omitted to insert in the rolls, because these taxes had not been dropped purposely or in bad faith by defendant, and had been subsequently placed on the rolls by the new receiver, a considerable part of them collected before the action began, and the balance remained a charge upon the taxed property in favour of the town. Even if the town had suffered a loss because of such omission, the defendant would not be liable if the omission took place through error, or was not due to bad faith or dishonesty: *Peterborough* v. *Edwards*, 31 U.C.C.P. 231.

When the defendant was dismissed from office, there was an overdraft in the bank for $343.95, which he as receiver had borrowed for school purposes on his personal guaranty.

Held, that defendant was entitled to judgment for that amount on his counterclaim against the plaintiffs.

Reference to the Master. No costs to plaintiffs, up to and including the trial, on account of their having made many serious and damaging allegations, in the statement of claim against defendant, and their entire failure to support such charges by evidence.

Other costs reserved.

Minty, for plaintiff. *Laird*, for defendant.

Mathers, J.] [March 14.

CANADA RAILWAY ACCIDENT CO. *v.* KELLY.

Security for costs—Company resident out of jurisdiction—Assets within jurisdiction—Branch office in province—Foreign Corporations Act, R.S.M. 1902, *c.* 28.

Appeal from an order of the referee setting aside an order for security for costs taken out by defendant on præcipe under Rule 978 of the King's Bench Act. The plaintiff company was described in the statement of claim as a corporation "having its head office in the City of Ottawa in the Province of Ontario, and a branch office in the City of Winnipeg."

Held, following *North-West Timber Co.* v. *McMillan,* 3 M.R. 277, and *Ashland Company* v. *Armstrong,* 11 O.L.R. 414, that defendant was prima facie entitled to the præcipe order.

(2) The assets of the company in this province, consisting of some office furniture of small value and the premiums collected at the branch office in Winnipeg for transmission to the head office in Ottawa, were not of such a character as to warrant setting aside the order for security.

(3) The plaintiffs had not acquired a residence in Manitoba, within the meaning of that term in Rule 978, by having a branch office here and taking out a license under the Foreign Corporations Act, R.S.M., 1902, c. 28, to transact its business in this province: *Ashland Company* v. *Armstrong,* supra.

Appeal allowed with costs to defendant in any event of the cause.

Coyne, for plaintiffs. *O'Connor,* for defendant.

Macdonald, J.] [March. 16.

MATTICE *v.* BRANDON MACHINE WORKS CO.

Patent of invention—Novelty—New combination of well-known devices.

Action for damages for infringement of plaintiff's patented grain pickling machine by defendants, and for an injunction. The defendants established the existence of two similar machines, patented before that of the plaintiff. The principle of each machine was the same, the grain being fed into a hopper on the top of a box containing a revolving worm or screw, and the

pickling liquid being in a box so placed that the liquid would fall into the box containing the worm so as to mix with the grain in its progress to the discharging end of the box; but in the plaintiff's machine the liquid was conveyed through a lead tube into the side of the box containing the worm to a point underneath the opening in the hopper so that the liquid and the grain ran through together, and much space was saved. The mixing of the grain, and the pickling fluid was, owing to the use of the lead tube, more thoroughly done by the plaintiff's machine than by either of the others, and its capacity was considerably greater.

Held, that there was sufficient novelty and improvement in the plaintiff's machine to support his patent.

Judgment for damages and an injunction.

Noble and *Card*, for the plaintiff. *Coldwell*, K.C., and *Henderson*, for defendants.

Mathers, J.] [April 3.

CANADA PERMANENT *v.* EAST SELKIRK.

Mandamus—Enforcing writ of execution against school district by levy of taxes—Compelling treasurer to make levy directed by sheriff—Who to apply.

The plaintiffs, being judgment creditors of the defendant school district, placed in the sheriff's hands a writ of execution to recover the amount of the judgment, and the sheriff, pursuant to the provisions of sec. 263 of the Public Schools Act, R.S.M. 1902, c. 143, issued his precept to the treasurer of the municipality directing him to levy a rate upon the lands in the school district sufficient to realize the amount of the judgment with interest and costs.

The treasurer having neglected to make such levy, the plaintiffs applied for a mandamus to compel him to do so, replying on sub-s. (f) of s. 263.

Held, that, although it had been held in *London & Canadian Co.* v. *Morris*, 9 M.R. 377, that the sheriff could apply for such mandamus, there was no reason why the execution creditors, being the parties chiefly interested, could not also make such application.

A. C. Ewart, for plaintiffs. *Heap*, for defendants.

Mathers, J.] TELLIER *v.* SCHILEMANS. [April 3.

Administrator pendente lite—Appointment of.

Application for the appointment of an administrator, pendente lite, of the estate of Denny D'Aout, in a suit to set aside his will and also a mortgage and bill of sale of his livery stable property to the defendants, Schilemans and Dujardin, on the ground that the same were executed by deceased when he was in a physically weak state, and under undue influence.

Held, following *Harrell* v. *Witts*, L.R 1 P. & D. 103, that it is only in case of necessity when it is shewn that the estate is in jeopardy, that such an appointment will be made; and that as to that portion of the estate in the hands of the defendant Dujardin, to which he did not claim title under the will and which he was taking good care of, no such case had been shewn; but that, as to the rest of the estate, the evidence brought the case within the rule laid down in *Bellew* v. *Bellew*, 34 L.J.P.M. & A. 125, and an administrator pendente lite of that portion of the estate should be appointed.

O'Connor, for plaintiff. *Haggart*, K.C., for defendant.

Mathers, J.] GULLIVAN *v.* CANTELO. [April 9.

Service out of the jurisdiction—Breach of contract to be performed within the jurisdiction.

The plaintiff, a resident of Manitoba, sued the defendant, a resident of Saskatchewan, for commission on the sale for defendant of lands situated in Saskatchewan. The bargain respecting the agency was closed between the parties at Winnipeg, when defendant agreed to pay a certain commission in case plaintiff could find purchasers. The statement of claim was served out of the jurisdiction without obtaining any order for leave and the referee, on the defendant's application, set aside the service.

Held, on appeal, that the service was authorized by sub-s. (e) of Rule 201, of the King's Bench Act, for, if any commission became payable under the contract, it would be the duty of the defendant to pay it to the plaintiff at his residence in Winnipeg, and so there would be, in case of non-payment, a breach within Manitoba of a contract "which according to the terms thereof ought to be performed within Manitoba."

Reynolds v. *Coleman*, 36 ch. D. 453, followed.

Appeal allowed with costs.

MacNeil, for plaintiff. *Phillipps*, for defendant.

Province of British Columbia.

SUPREME COURT.

Clement, J.] [March 2.

CITY OF FERNIE *v.* CROW'S NEST PASS, LIGHT & POWER CO.

Municipal law—Trades licenses—By-law, registration of, B.C. Stat. (1906) c. 32, s, 86.

A municipal by-law, providing for the imposition of a license "for every six months," was passed and registered on the 18th of September, and the time limited for the expiration of the first license thereunder was fixed for the 15th of the ensuing January. There was no provision made for the period of time between the passage of the by-law and the 15th of January.

Held, that a conviction of defendant company for carrying on business, on or about the 4th of December intervening, without having taken out a license under the by-law, was bad, in that section 1 of the by-law could apply only to a six months' license for which a six months' fee had been paid.

Held, further, that the copy of the by-law deposited for registration, having impressed upon it the seal of the municipality that was sufficient, and that it was not necessary to affix the seal to the certificate of the municipal clerk authenticating the by-law.

W. A. Macdonald, K.C., for plaintiff. *S. S. Taylor*, K.C., for defendants.

Hunter, C. J.] MACLEOD v. MCLAUGHLIN. [March 18.

Jury, right of to return a general verdict.

Before the charge to the jury, council for plaintiff asked for a direction to the jury to return a general verdict. Council for defendant objected, and urged that the jury had a right to return a general verdict if they chose, but that they should not be directed to do so.

Held, in *Mayor* and *Burgesses* of *Devises* v. *Clark* (1835) 3 A. & E., 506, it is stated that the jury may stand on their rights to return a general verdict, but the modern view is that it is the right of either of the litigants to have a general verdict.

A. D. Taylor and *Garrett*, for plaintiff. *Davis*, K.C., and *W. J. Whiteside*, for defendant.

Hunter, C.J.] RAINEY *v.* RAINEY. [April 27.

Order for sale of real estate pendente lite.

Rule 1, of order 50 provides, in part, "If in any cause or matter relating to any real estate, it shall appear necessary or expedient that the real estate or any part should be sold, the Court or a judge may order the same to be sold."

Held, that this is a general power, to be exercised by the Court or a judge according to the circumstances, and is not meant to apply only where a sale is necessary or expedient for the purposes of the action.

Craig, for plaintiff. *Wade,* K.C., for defendant.

Book Reviews.

Digest of the Law of Agency. By WILLIAM BOWSTEAD, of the Middle Temple, Barrister-at-law. Third edition, London: Sweet & Maxwell, Limited, 3 Chancery Lane, W.C. Canada Law Book Company, Ltd., 32 Toronto Street, Toronto. 1907. 514 pp. $5.00, cloth. $6.00, half calf.

This book is more than a digest, and more valuable than a mere digest could be. It is more in the nature of a code. The author first states his legal proposition and then illustrates it with the leading cases. So far as we have been able to examine the work, these legal propositions are sound as to law and they are certainly concise as to form. The arrangement of the subjects is convenient and logical. The author evidently is not in love with the Trade Disputes Bill, under which he says: "No action will lie against a trade union, or against any members or officials thereof, on behalf of themselves and all other members, in respect of any tort alleged to have been committed by or on behalf of the trade union. The ancient maxim may now be rendered; The King and trade unions can do no wrong."

The law and practice of interpleader in the High Court and County Court. By S. P. J. MERLIN of Gray's Inn, Barrister-at-law. London: Butterworth & Co., Bell Yard. 1907. 256 pp.

This is a handy book for the English practitioner, and will also be useful in the English speaking provinces of the Dominion. It has in addition a useful appendix of forms.

Canada Law Journal.

VOL. XLIII. JUNE 1. NO. 11.

THE LEGAL ASPECT OF RACE SUICIDE.

REX v. JACKSON.

At the May assizes held in Orangeville a man named Jackson pleaded guilty to the offence of unlawfully administering drugs to a woman with the intent of procuring a miscarriage. Under the Criminal Code of Canada he became liable to a maximum penalty of imprisonment for life, but as a matter of fact he was released on suspended sentence on giving a bond for $1,000 to appear when called upon. As the presiding judge said in addressing the jury, he "might never be called upon," and there can be little doubt that so long as he keeps himself clear of the criminal law in the future, no sentence will ever be imposed upon him.

A druggist, one Douglas, from whom the drugs are alleged to have been procured, is under indictment for the same offence, but it is stated that as he has already been used as a Crown witness against Jackson, no further proceedings will be taken against him. These circumstances have caused a good deal of excitement, and it is said some indignation, in Orangeville and the surrounding country, and assertions have been freely made in the newspapers that there has been, or is likely to be, a gross miscarriage of justice in the case of both Jackson and Douglas, and the Crown authorities have been admonished in no measured terms that the best thing they can do is to repair their alleged errors, as far as possible, by calling up Jackson to receive a punishment adequate to the crime of which he has pleaded guilty, and by proceeding against Douglas with the utmost rigour of the law. The case has unfortunately acquired to some extent a political importance, and assertions are freely bandied about by leading Toronto journals of both parties, one of which accuses the Attorney-General and the prosecuting counsel of giving an explanation which is "not only weak and inconsequent, but in every phrase of it sus-

picious," and assures its readers that "the people of Orangeville mock at this statement," and "refuse to rest assured that no consideration other than those of the interests of justice influenced the decision." The organs of the other party are not slow to retaliate on their opponents with accusations of adopting the methods of "yellow journalism" and discrediting for unworthy ends the fair fame of Canadian justice.

Into the political Donnybrook it need scarcely be said that this Journal does not propose to enter, but it is our duty to endeavour to point out as clearly as possible the true nature of the issues involved in a case like the present, which is so liable to be affected by the prejudices and passions of men.

We think, then, the public and profession will agree with us in repudiating any imputation that may have been cast upon the absolute good faith and integrity of the presiding judge and the prosecuting counsel, who were responsible for the Crown's action in the case of Jackson. The grounds of that action are not far to seek, and are such as have been not unfrequently acted upon in former cases of a similar nature, viz.: the great difficulty in obtaining satisfactory evidence of the crime, and the equally great difficulty of obtaining a conviction from a jury in such a case, even on the plainest evidence and the clearest instruction from the Bench. In this case the Crown counsel was disappointed in the evidence given by some important witnesses; and, as a conviction was apparently impossible, he thought it was better in the interests of the public that the prisoner should be allowed to plead guilty and then to go on suspended sentence, than that he should be acquitted and go free of the stigma of guilt, as well as its legal punishment. It may well be doubted whether upon the whole this mode of dealing with such cases is desirable, but it is one which has been often acted upon by those who have had in their guardianship the interests of British justice, by men whose characters are above suspicion and whose opinions are entitled to respect. Such bargains are in the public mind inconsistent with and detract from the dignity and forcefulness of the criminal law, but no hard and fast rule can be laid down.

As to the other branch of the case, viz.: the action of the Crown as regards Douglas, it would be impossible to say anything definite at present, as his case has not yet been disposed of.* It should be pointed out, however, that if, as appears to be the fact, Douglas was used as a Crown witness against Jackson before the grand jury, and in the proceedings for his extradition, it would not be in accordance with the traditions of British justice; nor, we may add, with the public policy on which these traditions are founded, that such a witness should thereafter be prosecuted, so long as it appeared that he had told the truth. It is no doubt lamentable that guilty persons should go free because they have assisted in bringing their associates in guilt to justice, but to all such considerations the honour of the Crown and the interest of the Commonwealth must be paramount.

One benefit which may result from the discussion of the painful and repulsive details of this case, is that it may call pulbic attention in a forcible way to the prevalence of certain evils, which were referred to by Chief Justice Falconbridge in his remarks to the jury when referring to the case, from the newspaper report of which we make the following quotation: "This is the sort of offence that is said to be very prevalent. It is said to be practised in the neighbouring republic and in our own country—that is what is known as race suicide. It is an abominable practice and those abetting it ought to consider their responsibility."

It is no part of our duty as editors of the *Law Journal* to discuss the subject of "race suicide" in its moral, social and religious aspects, and this is the less necessary as this great and vital question has been receiving of late much attention from the press and public, and from men of commanding influence such as President Roosevelt and others. There are indications not a few that the false delicacy which has so long hindered the full discussion of the pressing problems involved in the interpretation and application of the Sixth and Seventh Commandments, is being replaced, and not too soon, by the fearless utterances of men who see clearly that the present prevailing ignorance and

* NOTE.—Since the above was written, the Crown has taken the usual course and Douglas has been set at liberty.

bly end in some modifications of the existing arrangements which may eventually lead the way to the formation of an Imperial Court of Appeal. While difficulties of substance must inevitably be discovered, it is to be hoped that artificial obstacles may not be thrown in the path of those who desire to see the Empire's legal affairs more co-ordinated and simplified."

It is manifest that some changes in procedure are necessary. It is also desirable that, as far as possible, there should be a lessening in the expense of going to the "foot of the throne"; some modifications moreover, may be required to meet the needs of different colonies. But whilst all this may be true we are strongly in favour of the continuance of the right of appeal now enjoyed—a right which has been a great benefit in the due administration of justice in the past, and which is an appropriate and helpful link in binding together the various parts of our great and strangely constituted Empire.

It seems strange, but it is a fact, that at this late date the English Courts cannot take judicial notice of colonial and Indian statutes in the same way as they do of those of the Mother Country. For many purposes colonial law is considered as being in the same position as foreign law and provable by evidence of a lawyer from that colony. The measure now before the English Parliament is that Government printers' copies of colonial and Indian statutes shall be received as evidence without further proof, and it is made a felony to print or tender in evidence a false copy of such law.

Those who are interested in the subject of appeals as to matters of fact in criminal cases will read with interest an article in the May number of the *Law Magazine and Review*. The writer intends this to be a reply to a pamphlet by Sir Harry Poland, K.C., and Mr. Herman Cohen on the English criminal appeal bill, 1906. We have already expressed our opinion on this matter and given our readers the benefit of what is spoken of in the article before us as the "great speech of Lord Alverstone" on this subject (see 42 C.L.J. 582).

REVIEW OF CURRENT ENGLISH CASES.

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PROBATE—PRACTICE—COSTS.

Spiers v. *English* (1907) P. 22, was a probate action in which the plaintiff claimed revocation of the probate on the ground that the will had been obtained by undue influence. The plaintiff failed in the action, but claimed that the costs should be paid out of the estate because the defendant had obtained the will, and the onus of proving its validity rested on him. In disposing of this question Barnes, P.P.D., said that such an order is made in cases, viz., when the litigator is occasioned by the testator, or by persons interested in the residuary estate. But though the circumstances are such as to reasonably lead to investigation, then the Court leaves the costs to be born by those who have incurred them. In the present case the testatrix was supposed to be a pauper, and the will had been procured to be made by the defendant who was the relieving officer, under that supposition; but it had turned out after her death that she had some £1,200 in a savings bank. The costs were left to follow the event.

WILL—REVOCATION—INCONSISTENT WILLS — INTENTION — PROBATE.

Re Bryan (1907) P. 125, was an application for probate and the question was whether or not two inconsistent wills were to be together admitted to probate, or whether the later will was not to be regarded as revoking the prior will. The earlier will had disposed of the whole estate of the testatrix, but the later will while repeating some of the bequests contained in the former will was in other respects inconsistent with the first will, and did not dispose of the residue, and did not expressly revoke the earlier will. Barnes, P.P.D., held that the question as to whether there is, or is not, a revocation is to be gathered from a consideration of the substance and not merely the form of the testamentary documents, and where the intention remains in doubt upon the face of the documents, extrinsic evidence of the surrounding circumstances is admissible in order to place the Court as near as may be in the position of the testator at the time the last document was executed, but he also held that on the face of the documents alone in the present case, without resorting to any extrinsic evidence the second will impliedly revoked the earlier document.

COVENANT IN RESTRAINT OF TRADE—MASTER AND SERVANT—COMBINATION OF FIRMS—ENGAGEMENT OF SERVANT ON BEHALF OF COMBINATION—REASONABLENESS—INJUNCTION.

In *Leetham* v. *Johnston* (1907) 1 Ch. 323, the Court of Appeal (Farwell and Buckley, L.JJ.) have been unable to agree with the decision of Neville, J., (1907) 1 Ch. 189 (noted ante, p. 355. The Court of Appeal came in this conclusion on the ground that a covenant in restraint of trade cannot be validly made in gross, but only for the protection of the particular business in which the warrantee is employed as a servant; and that therefore notwithstanding the contract for service was made on behalf of the associated firms, yet it was a contract for the services of the defendant as a servant of only one of the subsidiary firms, and having regard to the business of that particular firm a restraint extending to the whole of the United Kingdom was too wide, and therefore wholly void.

SPECIALTY DEBT—MORTGAGOR—PAYMENT OF INTEREST BY DEVISEE OF MORTGAGED PROPERTY—TESTATOR'S GENERAL ESTATE—ACKNOWLEDGMENT — REAL PROPERTY LIMITATION ACT 1874 (37 & 38 VICT. C. 57), S. 8—(R.S.O. C. 133, S. 23).

In re Lacey, Howard v. *Lightfoot* (1907) 1 Ch. 330. The question raised in this case was whether the payment of interest to the mortgagee by a devisee of the mortgaged estate, would keep alive the mortgagee's claim as against the deceased mortgagor's general estate. Kekewich, J., thought that it would not, but the Court of Appeal (Williams, Farwell, and Buckley, L.JJ.) reversed his decision holding that such a payment was within the 37 & 38 Vict. c. 57, s. 8,—(R.S.O. c. 133, s. 23), and that the mortgagees were in consequence entitled to an order for the administration of the general estate.

TRUSTEE—BREACH OF TRUST—CHARGE ON SHARE OF BENEFICIARY —OMISSION TO GIVE NOTICE OF CHARGE TO TRUSTEE—ASSIGNMENT SUBJECT TO CHARGE—PAYMENT TO ASSIGNEE OF EQUITY OF REDEMPTION—NEGLECT OF TRUSTEE TO LOOK AT ASSIGNMENT—FRAUD—SOLICITOR—CONSTRUCTIVE NOTICE—JUDICIAL TRUSTEES ACT (59 & 60 VICT. C. 35), S. 3(1)—(62 VICT. C. 15, S. 1, ONT.).

In *Davis* v. *Hutchings* (1907) 1 Ch. 356, the plaintiff was a chargee on the share of a beneficiary in a trust fund, the equity

of redemption in this share had been assigned to the solicitor of the trustees, the assignment expressly reciting the prior charge of the plaintiff, no notice of which, however, had been given to the trustees. On the distribution of the estate the trustees relying on the statement of their solicitor that he was the assignee of the share, paid it over to him, without calling for, or examining the assignment under which he claimed: had they done so they would have had notice of the prior charge of the plaintiff. In these circumstances Kekewich, J., held that the trustees had been guilty of a breach of trust and were liable to make good to the plaintiff the amount of his charge, and that they could not be said to have acted reasonably so as to be entitled to relief from liability under 59 & 60 Vict. c. 35, s. 3(1). See Ont. Act, 62 Vict. (2) c .15, s. 1.

WILL—CHARITY—GIFT TO VICAR AND CHURCHWARDENS TO BE APPLIED "AS THEY SHALL THINK FIT."

In the case of *In re Garsard, Gordon* v. *Craigie* (1907) 1 Ch. 382, a testatrix by her will bequeathed £400 to the vicar and churchwardens for the time being of Kington to be applied by them in such manner as they in their sole discretion shall think fit. It was contended on behalf of the next of kin that this gift was void for uncertainty. Joyce, J., however, held that it was a good charitable gift for the benefit of the parish for ecclesiastical purposes.

LIFE TENANT — REMAINDERMAN — INVESTMENTS IN HAZARDOUS SECURITIES RETAINED BY TRUSTEES—INCOME.

In re Wilson, Moore v. *Wilson* (1907) 1 Ch. 394, was a case where a testator whose estate was largely invested in securities which would not be proper for trustees to invest in, bequeathed legacies, and his residue to a person for life. The trustees were expressly empowered to retain investments existing at the testator's death, and did so, and the question was whether the legatees and the tenant for life of the residue were entitled to the full amount of interest earned by the investments in hazardous securities, or only to interest at the rate of 4 per cent. per annum on moneys so invested. Eady, J., determined that so long as the trustees chose to retain the securities the legatees and tenant for life would be entitled to the full interest received in respect of such securities as were appropriated to the legacies, and residue respectively pursuant to a power in that behalf contained in the will.

WILL—RESIDUE—GIFT OF RESIDUE IN ALIQUOT SHARES—FORFEITURE CLAUSE—FORFEITED PART TO LAPSE INTO RESIDUE—DIVISION.

In re Wand, Escritt v. *Wand* (1907) 1 Ch. 391. A testator had disposed of his residue as follows as to 3/7th parts to a class of persons (hereafter called class A) as tenants in common, and 4/7th to another class of persons (hereafter called class B); and he provided that if a certain event happened in his lifetime the share of a certain member of class A should lapse and form part of his residuary personal estate. The event did happen and the question then arose in what proportions this lapsed or forfeited share should be divided, and Eady, J., held that it was divisible as follows, viz.: the remaining persons of class A were entitled to 3/7th and the members of class B were entitled to the remaining 4/7th of the share.

APPORTIONMENT—DIVIDENDS ON SHARES—COMPANY'S ARTICLES—EXPRESS STIPULATION AGAINST APPORTIONMENT—APPORTIONMENT ACT, 1870 (33 & 34 VICT. C. 35), S. 7—(R.S.O. C. 170, S. 4).

In re Oppenheimer, Oppenheimer v. *Boatman* (1907) 1 Ch. 399. A testator bequeathed certain shares in a company to trustees to pay "the income arising therefrom" to his wife for life. The testator died on January 4, 1906. Sometime after his death a dividend for the financial year ending October 31, 1905, was declared. The full dividend for the next financial year had not been declared. The articles of the company declared that every dividend whether arising from past or current profits should "for all purposes be deemed to accrue and fall due upon the day on which it was declared," and that every dividend should belong and be payable to those members on the register when such dividend is declared. It was claimed that notwithstanding these provisions the Apportionment Act (33 & 34 Vict. c. 35), s. 7—(R.S.O. c. 170, s. 4) applied, and that the dividends were apportionable and that the testator alone could make an express stipulation against apportionment so as to exclude the Act, and this he had failed to do; consequently that the whole of the dividend for the year ending 1905 and also that portion of any future dividend arising in respect of profits earned prior to his death formed part of his undisposed of estate, and Eady, J., gave effect to this contention. Whether this effectuated the real intention of the testator may well be doubted.

PARTNERSHIP—PARTNERSHIP ARTICLES—CONSTRUCTION "PROFESSIONAL MISCONDUCT"—EVIDENCE—ORDER ERASING NAME FROM REGISTER—DENTIST'S ACT, 1878 (41 & 42 VICT. c. 33), ss. 13, 14, 15.

Clifford v. *Timms* (1907) 1 Ch. 420 was an action by the plaintiff for a declaration that the partnership between himself and the defendant as dentists had not been dissolved by a notice served by the defendant purporting to dissolve the same, and for an injunction to restrain the defendant from acting on such notice. The defendant alleged that the plaintiff had been guilty of professional misconduct and that under a provision in the articles of partnership he was entitled to, and had put an end to the partnership. The defendant tendered as evidence of the alleged "professional misconduct," the order of the Medical Council acting under the Dentist's Act to strike the name of the defendant off the register of Dentists for alleged professional misconduct, and a report of the Dental Committee on which the order was based: but it was held by Warrington, J., that neither the order nor the report were admissible to prove the alleged misconduct within the meaning of the articles, and on the facts he found that the plaintiff had not in fact been guilty of professional misconduct as alleged, judgment was therefore given in favour of the plaintiff. The learned judge however expressly refrained from any expression of opinion as to the propriety of the order of the Medical Council. The question and the facts before them being different from those presented in the present case.

FORECLOSURE ACTION—ACTION TO FORECLOSE PRINCIPAL CHARGE AND FOUR SUPPLEMENTARY CHARGES—OMISSION OF FIFTH SUPPLEMENTARY CHARGE—SUBSEQUENT ACTION TO FORECLOSE FIFTH CHARGE—RES JUDICATA—SET-OFF OF COSTS—RULES 989, 1002(27)—(ONT. RULES 1161, 1165).

Bake v. *French* (1907) 1 Ch. 428 was an action to foreclose the equity of redemption in a charge on a reversionary interest of the defendant in certain property. The defendant had given a principal charge on the same reversionary interest and four other charges for subsequent advances and a prior action had been commenced to foreclose these charges, but by mistake the sixth charge now sued on had been omitted, a judgment had been pronounced in the first action for redemption or foreclosure and the defendant contended that this constituted a bar to the present

action and an application was made to stay the action, but Warrington, J., held that the former action in no way formed a bar to the present action and dismissed the application. Subsequently judgment was pronounced in this action for foreclosure and it was ordered to be consolidated with the prior action, and that the subsequent proceedings in both actions should be carried on as if they were one action. The plaintiff had previously applied to have the judgment varied in the first action by the inclusion of the sixth charge, but this application was dismissed with costs and he applied to Parker, J., to set-off the costs payable to him under the order of Warrington, J., in the second action, against the costs payable by him in the first action, but Parker, J., held that the two actions were independent proceedings up to the time of consolidation and that Rules 989, 1002(2) (Ont. Rules 1161, 1165) did not apply to costs incurred in independent proceedings so as to authorize a set-off to the prejudice of a solicitor's lien, but that the costs might be set-off against the costs payable under the consolidation order.

WILL—"BEQUEST OF PERSONAL PROPERTY DESCRIBED IN A GENERAL MANNER"—EXERCISE OF GENERAL POWER OF APPOINTMENT—GIFT OF STOCKS, SHARES AND SECURITIES—WILLS ACT, 1837 (1 VICT. C. 26, S. 27)—(R.S.O. C. 128, S. 29).

In re Jacob, Mortimer v. *Mortimer* (1907) 1 Ch. 445. A testatrix having general powers of appointment under a will, and marriage settlement over personal property which at the time of her death consisted of railway and colonial stocks bequeathed (subject to her husband's life interest) to her three sisters "all stocks, shares and securities which I possess or to which I am entitled." Her husband survived her, and the question presented for adjudication was whether or not the bequest in favour of the three sisters amounted under the Wills Act, 1837, s. 27—(R.S.O. c. 128, s. 29) to a valid execution of the powers in their favour as being "a bequest of personal property described in a general manner," and Parker, J., held that it was. He also held that the words "to which I am entitled" did not manifest a contrary intention, otherwise it would be difficult to apply s. 27.

FACTOR—MERCANTILE AGENT—AUTHORITY TO PLEDGE—CUSTOM OF PARTICULAR TRADE—FACTORS ACT, 1889, (52 & 53 VICT. C. 45) SS. 1, 2—(R.S.O. C. 150, S. 2).

In *Oppenheimer* v. *Attenborough* (1907) 1 K.B. 510 Chan-

nell, J., held that the authority given by the Factors' Act (52 & 53 Vict. c. 45), ss. 1, 2—(R.S.O. c. 150, s. 3), to a mercantile agent to pledge goods entrusted to him by the owner, is not restricted by the custom of a particular trade that a mercantile agent employed in that trade to sell goods shall have no authority to pledge them. And in the following case of *Oppenheimer* v. *Frazer* (1907) 1 K.B. 519, he further held that even though the agent obtain possession of the goods in circumstances amounting to larceny by a trick, yet a bona fide transferee would acquire a valid title as against the rightful owner. In the latter case the agent had represented to the plaintiffs that if he were entrusted with the goods in question he would take them to a prospective buyer and on that understanding they were entrusted to him. Instead, however, of taking them to the person he mentioned, he pledged part of them, and the rest he delivered to one Broadhurst to sell for him, and Broadhurst, though having ground for suspecting that the mercantile agent had improperly obtained possession, nevertheless sold the goods to a firm who purchased them in good faith, and agreed that the purchase should be on the joint account of Broadhurst and themselves. They accordingly debited him with half the price, and having resold at a profit, credited him with half the profit. The plaintiffs as rightful owners brought the action against the firm and Broadhurst for conversion, but it was held that the agent being in possession of the goods as a mercantile agent, it was immaterial that when he had obtained possession he intended to steal them: and that s. 2 applied and conferred a good title on the firm who had acted bona fide, but Broadhurst was liable to the plaintiffs for conversion. The fact that the firm had purchased on joint account with Broadhurst was held to be immaterial.

WORKMEN'S COMPENSATION ACT (60 & 61 VICT. C. 37)—"WORKMEN"—EXPERT DYER—(R.S.O. C. 160, S. 2(3)).

Bagnell v. *Levinstein* (1907) 1 K.B. 531 was an action under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), and the only point in it was whether the person in respect of whose death the action was brought was a "workman" within the meaning of the Act. It appeared that he was an expert who had taken a degree in science, and was employed by the defendants, a dye and chemical manufacturing company, as a skilled expert in the business. His employment involved manual labour on his part, and on this ground the County Court judge who

tried the action held that he was "a workman" within the Act. The Court of Appeal (Collins, M.R., and Cozens-Hardy, and Farwell, L.JJ.), however held that the occasional performance of manual labour was not the test. That the popular meaning must be given to the word "workman" in the Act, and to call a skilled expert a workman is to travel out of the ordinary meaning of that term: from this decision, however, Farwell, L.J., dissented.

MASTER AND SERVANT—COMMON EMPLOYMENT—ACTRESS—NEGLIGENCE OF FELLOW SERVANT—CONSTRUCTION OF CONTRACT.

Burr v. *Theatre Royal, Drury Lane* (1907) 1 K.B. 544 was an action brought by an actress employed by the defendants to recover damages for personal injuries sustained through the negligence of a fellow employee, a scene shifter. The contract of the plaintiff with the defendants expressly provided that notwithstanding the Employer's Liability Act, 1880, the defendants should not be liable to the plaintiff for injury occasioned her through the negligence of any person in the service of the defendants who is entrusted with superintendence, or to whose orders she was bound to conform. On behalf of the plaintiff it was contended (1) that the plaintiff was not a servant, but an artist engaged to exhibit her skill to whom the doctrine of common employment did not apply; and (2) that the clause in the contract above referred to rebutted the implication that the plaintiff undertook the risk of negligence by any fellow employee in the same employment; but the Court of Appeal (Collins, M.R., and Cozens-Hardy and Moulton, L.JJ.), were unanimous in affirming the judgment of Grantham, J., dismissing the action, on the ground that the plaintiff was an employee and as such bound by the doctrine of common employment, and that the clause of the contract relied on, in nowise rebutted the legal implication that the plaintiff must be presumed to have accepted the risks of negligence by any fellow employee.

FALSE IMPRISONMENT—EVIDENCE—SIGNING CHARGE SHEET.

Sewell v. *The National Telephone Co.* (1907) 1 K.B. 557 was an action for false imprisonment. The facts proved were that the plaintiff was arrested and taken to a police station by a police officer, and charged with stealing a piece of metal. He was detained in custody till the following day when he was brought before a magistrate, committed for trial and subsequently ac-

quitted. When at the police station the defendants' agent appeared and signed the charge sheet, but there was no evidence that the defendants had authorized the constable to make the arrest. On these facts Ridley, J., dismissed the action and his judgment was affirmed by the Court of Appeal (Collins, M.R. and Cozens-Hardy and Moulton, L.JJ.), on the ground that signing the charge sheet did not make the defendants responsible for the previous arrest, and what took place subsequently was done by a judicial officer and entailed no liability on the defendants.

WATERCOURSE—PUMPING—CAUSING WATER TO PERCOLATE OUT OF A STREAM.

English v. *Metropolitan Water Board* (1907) 1 K.B. 588 was an action brought by the plaintiff a riparian proprietor to recover damages against the defendants for an alleged interference with the waters of a stream. The act complained of consisted in the defendants having constructed a well near the stream in question from which they pumped water, which had the effect of causing water to percolate out of the bed and sides of the stream. It was found as a fact that the water which so percolated did not enter the defendants' well: but the effect of pumping from the well was that the general level of water in the adjacent soil was lowered to the extent of about twelve inches, with the result that the soil became dry and a portion of the water flowing down the stream leaked out through the bed and side of the stream, so that the volume of water in the stream was sensibly diminished. Lord Alverstone, C.J., who tried the action held that on these facts the plaintiff was not entitled to succeed on the ground that the case was not one of direct abstraction, but of the withdrawal of the support of subterranean water, for which no action would lie according to the case of *Popplewell* v. *Hodkinson,* L.R., 4 Ex. 248.

LANDLORD AND TENANT—COVENANT RUNNING WITH THE LAND—COVENANT BY SUB-LESSOR TO PERFORM COVENANTS OF HEAD LEASE OR INDEMNIFY SUB-LESSEE—COVENANT FOR QUIET ENJOYMENT—32 HEN. VIII. c. 34, s. 2—(R.S.O. c. 330, s. 13).

Dewar v. *Goodman* (1907) 1 K.B. 612, was an action by an assignee of an under-lessee for breach of covenant by the underlessor to perform the covenants of the head lease. The under-lease

under which the plaintiff claimed contained a covenant for quiet enjoyment free from interruption by the under-lessor, and also a covenant by the under-lessor to perform the covenants of the lessee in the head lease so far as they related to the premises not demised by the under-lease; or in default to indemnify the under-lessee. The under-lessor made default in performing the covenants of the head lease, by reason whereof the superior lessor re-entered and ejected the plaintiff. The under-lessor had assigned his reversion to the defendant, and it was contended for the plaintiff that the effect of the covenant of the under-lessor to perform the covenants of the head lease so far as they affected lands not demised by the under-lease, was to enlarge the covenant for quiet enjoyment into an absolute covenant for quiet enjoyment, so as to include the case of disturbance of the enjoyment of the plaintiff by the superior landlord for breach of the covenants which the under-lessor had covenanted to perform, and that such covenant so enlarged ran with the land and the defendant was consequently bound by it, and liable in damages for the breach. But Jelf, J., who tried the action, came to the conclusion that the covenant had not that effect, but was a mere collateral covenant binding only the covenantor, and that the plaintiff as assignee of the under-lessee was not entitled to the benefit, nor was the defendant as assignee of the under-lessor liable to the burden of it. He therefore dismissed the action, but not without "considerable doubt."

SHIP—CHARTER PARTY—DEMURRAGE — DELAY IN DISCHARGING CARGO—STRIKE PREVENTING DISCHARGE.

Elswick SS. Co. v. *Montaldi* (1907) 1 K.B. 626 was an action by ship owners for demurrage against the charterer. The charter party provided that the charterer was not to be liable for delays in unloading caused by strikes. In the course of unloading a strike occurred which had the effect of delaying the unloading, but prior to the strike an avoidable delay had occurred, and it was held by Bigham, J., that the defendant could not rely on the strike as an excuse for the delay except to the extent to which the delay was actually attributable thereto. He therefore held that as, prior to the strike, less than one half the cargo had been discharged whereas a great deal more ought by that time to have been discharged, and it was physically impossible for the defendant to have discharged the other half within

the prescribed time; therefore the defendant could not rely on the strike except as to that portion of the cargo which would properly have remained undischarged when the strike began had he previously carried on the discharge at the stipulated rate per day.

EMPLOYER AND WORKMAN—INJURY—DEFECTIVE PLANT—STEVEDORE—UNLOADING SHIP—DEFECT IN SHIP'S TACKLE—EMPLOYER'S LIABILITY ACT, 1880 (43 & 44 VICT. C. 42), S. 1(1): S. 2(1)—R.S.O. C. 160, S. 3(1), S. 6(1).

Biddle v. *Hart* (1907) 1 K.B. 649 was an action by a workman against his employer, a stevedore, to recover compensation for an injury sustained by the plaintiff in the course of his employment. The defendant was engaged to unload a vessel, and the plaintiff was one of the men employed by the defendant to do the work, and in the course of the unloading a bale fell owing to a defect in the ship's tackle which was being used in the work of unloading, and injured the plaintiff. The judge of the County Court held that the defendant was not liable for injuries caused by the defect in the ship's tackle, and a Divisional Court (Lord Alverstone, C.J., and Darling and Ridley, JJ.), affirmed his decision (Ridley, J., dissenting). The Court of Appeal (Barnes, P.P.D., and Farwell and Buckley, L.JJ.), however unanimously reversed the decision, holding that the defendant, if he chose to use the ship's tackle, owed a duty to the plaintiff to see that it was efficient and free from defects, and that it was for a jury to say whether or not he had discharged that duty; a new trial was therefore ordered.

SHIP—CONTRACT OF AFFREIGHTMENT—BILL OF LADING—EXCEPTION—DEVIATION.

In *Thorley* v. *Orchis SS. Co.* (1907) 1 K.B. 660 the Court of Appeal (Collins, M.R., and Cozens-Hardy and Moulton, L.JJ.) have affirmed the judgment of Channell, J. (1907) 1 K.B. 243 (noted, ante, p. 283), to the effect that a deviation from the voyage mentioned in a charter party has the effect of preventing the shipowners from setting up an exception clause relieving them from liability for negligence; as Collins, M.R., points out the undertaking not to deviate has the effect of a condition precedent the non-performance of which displaces the contract.

SHIP—SEAMAN—CONTRACT FOR SERVICE FOR ORDINARY VOYAGE—CARRIAGE OF CONTRABAND—REFUSAL TO PROCEED TO BELLIGERENT PORT—WAGES.

In *Carrie* v. *Palace Steam Shipping Co.* (1907) 1 K.B. 670 two or three points of interest are determined by the Court of Appeal (Collins, M.R., Cozens-Hardy, and Farwell, L.JJ.). (1) That a seaman in time of war entering into a contract in England for service on board the ship of an English ship carrying contraband of war for an ordinary commercial voyage, may lawfully refuse to proceed to a belligerent port; and (2) That the conviction and imprisonment of a seaman in such circumstances for refusing to proceed to a belligerent port, by a marine magistrate in a foreign port is no estoppel, on the seaman recovering his wages in an English Court, and (3) That the seaman in such circumstances is entitled to his wages not only up to the time of his return to England, but also, under s. 134, of the Merchants Shipping Act 1894, up to the final adjudication of his claim, which in this case, was up to the delivery of the judgment of the Court of Appeal.

SALE OF GOODS—CONTRACT TO INSURE GOODS AGAINST "ALL RISKS"—WARRANTY IN POLICY AGAINST "DETENTION"—SLAUGHTER OF CATTLE IN CONSEQUENCE OF GOVERNMENT PROHIBITION AGAINST LANDING.

In *Yuill* v *.Scott* (1907) 1 K.B. 685, the plaintiffs had purchased a quantity of cattle from the defendants for shipment to Durban it was a term of the contract that the defendants should insure the cattle "against all risks." The defendants handed to the buyers a policy which was an ordinary "all risks" Lloyd's policy, but which in accordance with the usual practice contained a warranty against "capture, seizure, detention and consequences thereof." Disease broke out among the cattle in the voyage, and on arrival at Durban the authorities forbade their landing, and the cattle were consequently slaughtered. The insurers having refused to pay the loss thus sustained, as one not covered by the policy, the present action was brought to recover damages for breach of contract to insure against "all risks," and Channell, J., held that the plaintiffs were entitled to recover, the policy not having been a proper performance of the covenant, and that what was understood as an "all risks" policy by insurance brokers and underwriters, was not an "all risks" policy under the covenant as between the plaintiffs and defendants.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

From Clute, J.] [March 14.

REX *v.* CENTRAL SUPPLY ASSOCIATION.

Criminal law—Conspiracy in restraint of trade—Crim. Code s. 520—Evidence.

Held, per MOSS, C.J.O., MACLAREN, and GARROW, JJ.A. (OSLER and MEREDITH, JJ.A., dissenting), that the defendants were to be judged and condemned, if condemned at all, upon the acts proved to have been committed by them after incorporation, but in weighing and estimating these acts the Court might look at the immediately and approximately antecedent acts of the individuals now comprising the corporation and directing its operations: and the acts occurring after incorporation were, in view of their history, origin, and apparent purpose sufficient to uphold the trial Judge's conclusions.

Per GARROW, J.A.—It was not a sound objection to the indictment that it would not lie against any corporation except those named in s. 520, nor that there must be at least one natural person as distinct from a corporation indicted as a co-conspirator.

Per OSLER, J.A.—The conviction was bad and the appeal should be allowed because evidence was wrongly introduced comprising the bulk of the record of unlawful acts and conspiracy committed by individual members of the old unincorporated supply association years before the corporation came into existence, and such evidence evidently affected the result; while any evidence there was of anything done or completed by the defendants after incorporation was too slight and flimsy to support the conviction.

Per MEREDITH, J.A.—The evidence in regard to the misconduct of the supply association in tendering was especially objectionable.

Held, also, per MEREDITH, J.A., that the conviction was also bad because there was no evidence of any concluded agreement, legal or illegal on the part of the supply association; and also,

because the supply association was not within the provisions of s. 520, not being one of the corporations named; and the word "person" was used in its ordinary sense and not as including a company.

Watson, K.C., and *W. W. Denison*, for appellants. *Cartwright*, K.C., and *DuVernet*, for the Crown.

Full Court.] [March 14.

MUMA *v.* CANADIAN PACIFIC RY. CO.

Railway—Work train—Rule as to protecting by flagmen, unless otherwise sufficiently protected — Other precautions—Absence of air brakes—Voluntarily incurring risk—Contributory negligence—Absence of liability at common law—Liability at common law—Liability under Workmen's Act.

The deceased, who was in charge of a gang of labourers, employed in removing earth from a cutting on the defendants' railway, acting, as he believed, in the company's interests, to prevent the loss to them of the labourers' time, by the work train engaged in the work being kept at a siding, induced the conductor in charge of the train to move it on to the main track, and to proceed to the cutting, by backing the train slowly thereto. By one of the company's rules, the train should not have been moved, —unless other sufficient precautions were taken,—until flagmen were placed at stated intervals in front and rear of the train. No such flagmen were so placed here; but the conductor took the precaution of standing himself as a look out on the top of the van, and for a like purpose placed the deceased in the cupola, while he instructed the engine driver to keep a strict look out towards him so as to observe his signals and to act upon them. When the train was distant some 600 yards from another work train approaching them, also moving slowly, the conductor signalled the engine driver to stop, and had he done so, a collision which occurred, whereby the deceased was killed, would have been avoided.

Held, that the company were liable under the Workmen's Compensation for Injuries Act, for the deceased's death; and for the damages recoverable under that Act.

Deyo v. *Kingston and Pembroke R.W. Co.* (1904) 8 O.L.R. 538 distinguished.

Liability was claimed at common law by reason of the train not being furnished throughout with air brakes.

Held, that no such liability existed, for, even if under the Railway Act, such brakes were necessary, it not being a passenger train, the accident did not occur through the want of such brakes, but by reason of the engine driver's failure to see and act on the conductor's signal.

It was also contended that there could be no recovery here, in that the deceased had voluntarily incurred the risk, and was guilty of contributory negligence; but, as these matters were not raised in the pleadings, or questions thereon submitted to the jury, the objections were not given effect to.

G. T. Blackstock, K.C., and *Angus MacMurchy,* for the defendants, appellants. *J. Harley,* K.C., for the plaintiff, respondent.

Full Court.] [April 22.

HAWTHORNE *v.* CANADIAN CASUALTY CO.

Insurance—Sprinkler leakage insurance—Loss from frost—Statement by agent—Authority of—Statement made in application and interim receipt—Condition in policy.

Under instructions from the plaintiffs to obtain for them an insurance against loss by accidental leakage from their sprinkler system of fire protection, an insurance broker attended at the company's office and was informed by the accountant in charge that such insurance covered frost damage, and he thereupon applied for such insurance; the rate was subsequently fixed, no mention being made, as was the fact, of there being an extra rate of cover such frost damage. An interim receipt was issued insuring the plaintiffs against such accidental leakage, etc., but merely stating that the insurance was subject to the directors' approval, etc., and afterwards a written form of application which had been delayed through lack of information, was completed. In answer to a question as to the protection against freezing, it was stated that the pipes were frost proof to roof, and building steam heated. A couple of months afterwards the account for the premium was rendered to the agent who forwarded it to the plaintiffs, who paid the same; but in the meantime a loss had occurred through leakage occasioned by the bursting of frozen pipes. A policy had also been issued, but had not been received by the plaintiffs, in-

suring the plaintiffs against such accidental leakage, one of the conditions stating that the policy did not cover damage resulting from exposure, rupture, collapse or leakage from steam pipes or steam boilers, or resulting from any interruption of business or stoppage of any work or plant, or from freezing or from fire, or violation of law, etc. In an action to recover for the loss sustained by the plaintiffs,

Held, that the plaintiffs were entitled to recover, that as to the interim receipt the only limitation therein was that the application was subject to the directors' approval, and that they had signified such approval by the issuing of the policy; that the statement made by the insured in the application as to the pipes being frost proof was immaterial, if, as the defendants contended, damage by frost was not insured against; and, as to the condition in the policy, not only had the plaintiffs never seen the policy, but the exception as to frost was not expressed in terms sufficiently clear to exonerate the defendants.

Watson, K.C., for defendants, appellants. *Blackstock*, K.C., for respondents.

From Divisional Court.] [April 22.

METALLIC ROOFING COMPANY *v.* JOSE.

Trades union—Strike—Combined action—Intention to inflict damage—Actionable wrong—Indorsement and aid of other association—Injunction.

Appeal by the defendants from the judgment of the Divisional Court reported, 12 O.L.R. 200, dismissed.

O'Donoghue and *T. J. W. O'Connor*, for the appeal. *Tilley* and *Parmenter*, contra.

HIGH COURT OF JUSTICE.

Riddell, J.] MILLS *v.* SMALL. [March 11.

Chose in action—Assignment of claim of several contractors to one—Action in name of one for payment of all.

The plaintiff a contractor in Canada and two contractors in the United States had performed some work on a theatre in Canada for which the owner refused to pay. The foreign con-

tractors at the instance of their solicitors, but without the knowledge of the plaintiff assigned all their claims to him absolutely with a view of collecting the amounts due in the name of the plaintiff. This was communicated to the plaintiff who assented to the arrangement and he was indemnified against costs and guaranteed payment of his claim. At the trial, it was

Held, on objection taken, that this was not an "absolute assignment" within s. 58, sub-s. (5) of the Judicature Act R.S.O. 1897, c. 51, but leave to amend by adding the foreign contractors as plaintiffs, was granted.

H. H. Bicknell, for plaintiff. *J. L. Counsell,* for defendant.

MacMahon, J.] JONES *v.* SHORTREED. [April 11.

Mortgage—Subsequent sale of part charged with whole mortgage —Proceeding to sell under the mortgage—Rights of subsequent mortgagee of the part sold—Redemption or assignment—Dower—Election under will.

In 1889 plaintiff's husband mortgaged the west half of a lot containing 100 acres to a loan company plaintiff joining for the purpose of barring dower, with a provision that the company and its assignees could from time to time release portions without affecting the remainder or the covenants in the mortgage. In 1900 the husband sold the property (reserving 15 acres on the north-west corner) subject to the mortgage to the loan company, the amount of which was deducted from the purchase money and which the purchaser covenanted to pay off and he received from the purchaser a mortgage for $350 on the 85 acres sold. The husband died in 1903 having bequeathed to his wife all his personal property, stock, vehicles, life insurance and the $350 mortgage "on the south-west 85 acres," etc., also the north-west 15 acres "while she lives and remains unmarried" and after to his son. The plaintiff had become the owner of a further $290 mortgage by the purchaser. She married again. The son who was entitled to the 15 acres on his mother's remarriage received a notice from the loan company demanding overdue interest and threatening sale proceedings and then arranged with the defendant to obtain an assignment of the loan company's mortgage and to proceed to foreclose in order to free his 15 acres from that mortgage and make the 85 acres satisfy it. The assignment was

obtained and notices of sale were given when the plaintiff offered to pay off the loan company's mortgage on condition of getting an assignment of it which was refused, but she was offered a discharge on an assignment of the debt covering the 85 acres with the 15 acres freed which also was refused. In an action subsequently brought to compel an assignment or redemption,

Held, that the plaintiff's rights were confined to the 85 acres; and that she was not entitled to a conveyance or assignment of the whole 100 acres.

Held, also that the design of the testator as evidenced by his will was to give the 15 acres to his son free from his mother's dower and that her conduct in accepting the mortgage receiving her husband's insurance, and selling the stock was a clear election to take under the will.

Leitch v. *Leitch* (1901) 2 O.L.R. 233 followed.

Strathy, K.C., for plaintiff. *Hewson*, for defendant.

Mabee, J.] [April 15.

IN RE BROWN AND CORPORATION OF OWEN SOUND.

Municipal corporation—Compensation for lands injuriously affected—Closing road—"Advantage derived from contemplated work"—Construction.

Appeal from award of County Court judge.

Under s. 437 of the Con. Mun. Act, 1903, Edw. VII. c. 19, every council shall make to the owners of real property taken by the corporation, or injuriously affected by the exercise of its powers, due compensation for any damages necessarily resulting from the latter "beyond any advantage which the claimant may derive from the contemplated work."

Held, that this means the "contemplated work" of the corporation alone, and that one injuriously affected by the closing of a road which was part of a scheme for granting facilities to a certain lumber company, was entitled to compensation without any diminution of the amount of such compensation by reason of the fact that the erection of the mills of the lumber company greatly enhanced the value of the said lands.

Hodgins, K.C., and *Frost*, for appellants. *Sampson*, for respondent.

Anglin, J.] [April 17.

RE CANADIAN HOME CIRCLES.

Insurance—Varying apportionment—Postponing payment till after full age—Ineffective provision.

In an insurance certificate Eliza J. Smith designated Augustus Smith as a beneficiary to the extent of $500. By her will she reapportioned her insurance reducing his interest to $250, and further directed that he should not be paid his share till the age of twenty-five. Augustus Smith was now twenty-one, and the order of Canadian Home Circles applied for leave to pay the $250 into Court to which he objected, claiming the right to immediate payment.

Held, that even if s. 160 of the Insurance Act as to altering or varying apportionments in respect to insurance moneys authorized the postponing of the period of enjoyment by any preferred beneficiary beyond the time of his attaining twenty-one years, such provision was ineffective, for it is well established that all persons who attain twenty-one are entitled to enter upon the absolute enjoyment of property given to them by will notwithstanding any direction by the testator to the contrary, unless between twenty-one and the latter age specified by the testator, the property is given for the benefit of another or so clearly taken away from the devisees up to the time of their attaining a greater age as to induce the Court to hold that there has been an intestacy as to the previous rents and profits. It is impossible to distinguish between such a provision in regard to insurance and a like provision in regard to personal property bequeathed by will.

Dowler, K.C., for Canadian Home Circles. *W. J. T. Lee*, for Augustus Smith.

Divisional Court.] REX *v.* CHISHOLM. [May 6.

Municipal corporation—By-law—Regulating weight of bread—Criminal law—Mens rea.

Motion to quash conviction for selling bread in loaves lighter than the proper weights contrary to a by-law of the City of Toronto entitled "A By-law to Provide for the Weight and Sale of Bread."

Held, that under s. 580, sub-ss. 10, 11 and 583, sub-s. 1, of the Con. Mun. Act, 1903, 3 Edw. VII. c. 19, the city had power to pass the by-law, and the same was not ultra vires as creating a criminal offence or otherwise.

Held, also, that no evidence of mens rea was necessary to conviction, the word "wilfully" not being used in the statute or by-law.

Mackelcan, for city. *DuVernet*, for defendant.

Britton, J.] REX *v.* O'GORMAN. [May 7.

Criminal law—Change of venue—Convenience—Prejudice.

The principle on which a change of venue (in a criminal case) will be ordered is that there is fair and reasonable probability of partiality and prejudice in the district, county or place within which the indictment would otherwise be tried: and

On a motion to change the venue notwithstanding that a strong case was made out for the change if the balance of convenience was to be considered still as it was not shewn that there was or was likely to be any prejudice against the accused and certainly no more where the indictment was found than in the place to which it was proposed to change the venue the motion was refused.

Johnston, K.C., for the motion. *Lynch-Staunton*, K.C., for the Crown.

Cartwright, Master.] HYSLOP *v.* OSTROM. [May 9.

Practice—Signing judgment for want of statement of defence—Necessity for affidavit.

An affidavit is necessary and should be made and filed when judgment is signed for want of statement of defence after filing and service of statement of claim and a judgment entered without such affidavit may be set aside.

Paterson, K.C., for the motion. *Geo. Kerr, Jr.*, contra.

DIVISION COURTS.

THIRD DIVISION COURT, COUNTY OF HALTON.

FRAZER *v.* MCGIBBON.

Innkeeper—Liability for loss of property by guest.

The plaintiff went as a guest to defendant's hotel; took off his overcoat, and hung it in the usual place, but called no one's attention to it. Owing to a fair in the town, the hotel was crowded. A special cloak-room had been provided, and a notice to that effect had been put in the public sitting-room. The plaintiff did not see this notice; nor a notice in the hotel register book that the proprietor would not be responsible for coats, etc., unless checked. The coat was not to be found when the plaintiff left the hotel in the evening:—

***Held*, that the defendant was liable for the value of the missing article.**

Discussion of the legal status, rights, duties and liabilities of innkeepers.

[MILTON, April 9, 1907.—Gorham, Co.J.

The plaintiff claimed from the defendant, an hotelkeeper, the sum of $20.00 as the value of an overcoat, and other articles of clothing lost at the defendant's hotel when the plaintiff was a guest there, owing to the alleged default of the defendant. The defendant disputed the plaintiff's claim. The plaintiff on Oct. 2nd travelled from Milton, his place of residence, to Georgetown for the purpose of attending a fair there. The defendant was proprietor of the Clark House in Georgetown and carried on the business of an innkeeper. The plaintiff reached the defendant's hotel in the morning and when he entered the hotel he intended to enter his name in the hotel register, a book kept on the office counter for that purpose, but, owing to being interrupted or turned from his intention by meeting some friend, failed to do so. Shortly after going into the hotel he took off his overcoat and hung it up where he had been in the habit of hanging it and where he saw others do the same. He did not ask anyone to take charge of his coat, nor call the attention of anyone to it. The defendant admitted that others hung their coats where plaintiff hung his and that he knew this. The hotel was on that day thronged and he had in consequence provided a cloak room and a man in charge of same, who received coats, etc., from guests

and gave "checks" for same. He also put up a notice, or notices in the public sitting room that such a room had been provided. Plaintiff says he did not see this notice, nor did he know there was such a room and that, had he known, he would have put his coat in that room and taken a check. Defendant admits that he did not tell the plaintiff there was such a room until plaintiff told him of the loss of his coat, when the defendant for the first time learned that the plaintiff had brought an overcoat into the hotel. There was a notice at the top of each page in the hotel register book to the effect that the proprietor will not be responsible for coats, etc., unless "checked." The plaintiff says he did not see this notice and knew nothing of it. The plaintiff, after hanging up his coat as mentioned, remained about the hotel until noon when he had dinner for which he paid on coming from the dining room. After his return to the hotel in the evening he remained there until he was ready to start for home when he, for the first time since he had hung up his coat in the hotel, looked for it where he had hung it. It could not then, and has never since been found.

Plaintiff in person. *W. A. F. Campbell,* for defendant.

GORHAM, Co. J.—The law to be considered in this class of cases is very old. Some judges and text writers find great similarities between the civil law and the common law, but at the same time shew great dissimilarities. Others do not hesitate to say the law applicable is the "law and custom of England" without reference to the civil law—that it is peculiar to the English law. This law and custom of England—the common law—originally imposed upon an innkeeper certain liabilities to prevent him from acting in collusion with the bad characters who in old times infested the roads, and to protect wayfarers and travellers who on their journeys, brought goods into the inn. The wayfaring guest had no means of knowing the neighbourhood or the character of those whom he met at the inn. It was therefore thought right to cast the duty of protecting the guest upon the host. Knowing that this is one of his duties, one of the liabilities he incurs, the innkeeper can make such charge for the entertainment of his guest as will compensate him for the risk. It may be observed, that, unless the law cast upon him this burden, a dishonest innkeeper might be tempted to take advantage of a wealthy traveller. With that view the innkeeper was

placed in the position of an insurer of the goods of his guest and correlative to his liability is his right of lien upon the goods which the guest brings with him into the inn.

The innkeeper must be the keeper of a common inn, that is one who makes it his business to entertain wayfarers, travellers and passengers and provide lodgings and necessaries for them, their horses and attendants and receive compensation therefor. He must admit and entertain to the extent of his accommodation all persons of the class for whose entertainment he holds out his house and against whom no reasonable objection can be shewn. He may exclude such as are not sober, orderly, able to pay his reasonable charges, or such as ply his guests with solicitations for patronage in their business, or whose filthy condition would annoy other guests. It appears that he may limit his accommodation and entertainment to a certain class. Persons other than guests are said prima facie to have the right to enter an inn without making themselves trespassers; for there is an implied license for the public to enter, though such license is in its nature revocable and those thus entering become trespassers when they refuse to depart when requested. An innkeeper by opening his house—his inn—offers it to the use of the public as such, and thereupon the common law imposes on him certain duties and gives him certain rights. These duties and rights as well as the attendant liabilities have been changed, in some respects made heavier and in some respects made lighter, by statute. In the Province of Ontario the statutes bearing directly on these duties, rights and liabilities are the Liquor License Act and the Act Respecting Innkeepers. That an innkeeper may not be licensed under the Liquor License Act does not change the character of the business of him who entertains travellers, etc. The possession of such a license does not make, nor the want of it prevent a person from being, an innkeeper at common law. It is his business alone that fixes the status of a person in this respect. A license saves the innkeeper from liability to certain penalties imposed by the Act, but neither the possession nor the want of it will save him from liability to his guests. Here it may be noted that "inn" and "hotel" are synonymous. Ordinarily in Ontario "tavern" is also used synonymously with "inn"; in England though, it appears to signify a house where food and drink without lodgings may be obtained. To those who may be curious about the origin of these words and the origin of the business of hotel keeping I would recommend the careful reading of *Cromwell* v. *Stephens*, 2 Daly (N.Y.C.P.) 15.

It is necessary to consider who is a guest and at what point of time the relation of inn keeper, or landlord, and guest arises. A guest is one who resorts to, and is received at an inn for the purpose of obtaining the accommodation which it purports to afford. He may be a wayfarer, traveller or passenger who stops at, or patronizes an inn as such. He may come from a distance or live in the immediate vicinity. He comes for a more or less temporary stay, without any bargain for time, remains without one and may go when he pleases, paying only for the actual entertainment received. His stay and entertainment may be of the most transient kind. One who goes casually to an inn and eats, or drinks, or sleeps there, is a guest, although not a traveller: *York* v. *Grindstone,* 1 Salk. 388; *Bennett* v. *Mellor,* 5 T.R. 273; *Orchard* v. *Bush* (1898), 2 Q.B. 284; *McDonald* v. *Edgerton,* 5 Barb. (N.Y.) 560. And a party continues a guest though he goes to view the town for any time, or to view any spectacle in the town; *Gelley* v. *Clerk,* Cro. Jac. 188; *McDonald* v. *Edgerton,* supra; or goes out and says he will return at night; *Whites Case,* Dyer 158 b. The liability of the innkeeper as such will continue during the temporary absence of the guest: *Day* v. *Bather,* 2 H. & C. 14. Note the following cases, *Brown Hotel Co.* v. *Buckhurdt,* 13 Cole. App. 59; *Grinnell* v. *Cook,* 3 Hill (N.Y.) 485; *McDaniels* v. *Robinson,* 26 Vt. 316. If the relation of landlord and guest be once established, the presumption is that it continues until a change of that relation is shewn: *Whiting* v. *Mills,* 7 U.C. Q.B. 450.

"It is important to ascertain when the relation of innkeeper and guest commences, in cases involving liability for the loss of, or injury to, the guest's effects. This is a question of fact, the solution of which generally depends on the facts of each case. It is obvious that when a person goes to an inn as a traveller or wayfarer, and the innkeeper receives him as such, the relation of landlord and guest attaches at once. The intention to avail himself of the entertainment, that is, to obtain refreshments, or lodging, or both, is material, and if the party should engage and pay for a room merely to secure a safe place for the deposit of his valuables, or without any intention of occupying it, he would not be a guest. Under some circumstances too, the relation may commence before the party actually reaches the inn." Am. & Eng. Ency. of Law, vol. 16, page 520.

In the United States it has been decided that when a traveller arrives at a station, and is met by the porter of an hotel and the traveller delivers to the porter his baggage or the check for

getting the same from the railway authorities, the traveller is thereby so far constituted a guest as to render the proprietor liable for the safe keeping or re-delivery of the baggage. The liability of the proprietor, it was said, commences from the time of the delivery of the baggage or check to the porter: *Coskery* v. *Nagle*, 20 Am. St. R. 333 and *Sasseen* v. *Clark*, 37 Ga. 242, and *Williams* v. *Moore*, 69 Ill. App. 618, and *Eden* v. *Drey*, 75 Ill. App. 102.

In England and Ontario there being, so far as I can ascertain, no direct authority on the point as to the moment of the commencement of the relation of landlord and guest, one may, I think, infer from the reasoning in the arguments of counsel and in the judgments in the reported cases that, as the innkeeper is under an obligation at common law to receive and afford proper entertainment to everyone who offers himself as a guest, if there be sufficient room for him in the inn and no good reason for refusing him, the relation commences the moment the person presents himself and is accepted. While the presenting of himself must be a positive act on the part of the would-be guest, the acceptance on the part of the innkeeper need not be, in fact the mere want of active objection on the part of the innkeeper to the person so presenting himself, may be taken as evidence that the innkeeper has accepted him as guest. So that, if a person goes to an inn as a wayfarer or traveller with the intention of becoming a guest, which intention may be evidenced only by the act of the person in so presenting himself, and the innkeeper does not actively object to, or refuse him at once, it may well be, that he, on the very moment of such presentation and non-objection, becomes the accepted guest of the landlord at his inn, and then the relation of landlord and guest, with all its rights and liabilities is instantly established between them.

The relation of innkeeper and guest having been established it becomes the duty of the innkeeper to keep such goods as the guest brings with him into the inn safely night and day. And this although the guest does not deliver his goods to the innkeeper or his servant, nor acquaint him with them: *Calye's Case*, 8 Coke 32; 1 Sm. L.C. 10th ed. 115. This it has been said, is necessary for the protection of those resorting to the inn, from the negligence and dishonest practices of innkeepers and their servants: *Holder* v. *Soulby*, 8 C.B.N.S. 254. As will appear hereafter, it is not necessary at common law that the guest's goods should be in the special keeping of the innkeeper, it is

generally sufficient that they are within the inn under his implied care, and as soon as the goods are brought into the inn, though there is no actual delivery of the goods, nor any notice of them given to the innkeeper, this custody begins. If he desires to avoid liability for their loss on injury he must give the guest direct notice. Hanging up a coat in the place allotted for that purpose is placing it infra hospitium, that is in charge of the innkeeper and under the protection of the inn, though it is done in the absence of the landlord and his servants: *Orchard* v. *Bush* (1898), 2 Q.B. 284; *Norcross* v. *Norcross,* 53 Me. 163. Wills, J., in his judgment in the *Orchard Case* remarked, "I think a guest is a person who uses the inn, either for a temporary or a more permanent stay, in order to take what the inn can give. He need not stay the night. I confess I do not understand why he should not be a guest if he uses the inn as an inn for the purpose of getting a meal there," and further "The innkeeper's liability is said to arise because he receives persons causâ hospitandi. I cannot see why he receives them less causâ hospitandi if he gives them refreshment for half a day, receiving them in the same way as other persons are received, than if they stay the night at his inn. It makes no difference that he receives a large number of people who only take a meal at the inn. He does receive them, and as an innkeeper, and his liability as an innkeeper thereupon attaches in respect of them"; and Kennedy, J., remarked, "I agree that, on the facts of this case, the plaintiff was a traveller; but apart from the question whether he was a traveller or not, I am of opinion that if a man is in an inn for the purpose of receiving such accommodation as the innkeeper can give him he is entitled to the protection the law gives a guest at an inn."

In *Norcross* v. *Norcross,* 53 Me. 163, the facts were very much the same as in the case before. It was decided that plaintiff was a guest and that the innkeeper, the defendant, was liable for the loss of the coat; that if a guest, in the absence of the landlord and his servants, hang up his coat in the place in an inn allotted for that purpose, it is infra hospitium.

In *Bennett* v. *Mellor,* 5 T.R. 273, the plaintiff's servant took goods which he had been unable to sell at the weekly market, to the defendant's inn, and asked the defendant's wife if he could leave them till the week following. She answered she could not tell, for they were full of parcels. The plaintiff's servant then sat down in the inn and had some liquor. He put the goods on the floor behind him, whence they were stolen. It was

decided that the plaintiff's servant had by sitting down and partaking of refreshment become a guest and that it became the duty of the innkeeper to protect his goods or answer for their loss.

In *McDonald* v. *Edgerton,* 5 Barb. (N.Y.) 560, the plaintiff sued defendant, an innkeeper, to recover the value of an overcoat. Plaintiff stopped at defendant's inn on general training day, about 7 o'clock in the morning; soon after the plaintiff came he took off his overcoat; he gave the overcoat to the barkeeper; he treated a number of people at the bar and paid for the liquor; he then went out; in the evening he came back and asked for his coat; it could not be found; the defendant was held liable. In giving judgment the Court remarked, "The purchasing of the liquor was enough to constitute the plaintiff a guest": Citing *Bennett* v. *Mellor,* 5 T.R. 273; 2 Kent's Com. 593; *Clute* v. *Wiggins,* 14 Johns. 175. Again, "It is fairly to be inferred from the evidence in the case that the plaintiff lost his coat before he started to leave the town to go home, and if he was only out to see the town or to view the training, intending to return to the defendant's before he left for home and get his coat, then, I think, he was still to be considered as a guest of the defendant": Citing 2 Crokes R. 189 and 1 Comyns Dig. 421, 413 and *Grinnell* v. *Cook,* 3 Hills R. 490.

An innkeeper cannot discharge himself of the duty imposed upon him by the common law by a general notice. If he desires to limit his liability in anyway he must give the guest express notice, that is the notice must be brought home to the guest. The posting up of, or the putting upon the hotel register book, a notice is not sufficient unless it can be shewn that the guest saw it and read it: *Richmond* v. *Smith,* 8 B.C. 9; *Packard* v. *Northcraft,* 2 Met. (Ky.) 442. In *Bernstein* v. *Sweeny,* 33 N.Y. Super. Ct. 271, it was decided that the signing of a register under a printed heading containing an agreement that the innkeeper shall not be responsible for the loss of valuables unless deposited in the safe, is not the contract of the guest in the absence of any proof that it was seen or assented to by him.

In *Morgan* v. *Ravey,* 6 H. & N. 265, the plaintiff was staying at an hotel in London. In his bedroom was hung up a notice, that, in consequence of robberies having taken place at night in London hotels, the proprietor requested visitors to bolt their doors and leave their valuables at the bar, otherwise he would not be responsible. This notice plaintiff saw, but swore he read only

the word "Notice." He did not bolt his door (because, as he said, he did not know how), nor did he leave his watch or other valuables at the bar; next morning they were gone; the jury having found that there was no negligence on his part, the Court refused to disturb the verdict for the plaintiff.

The defendant by holding himself out as an hotel, or innkeeper, and his house as a common inn, invited the plaintiff as one of the travelling public to become a guest. The plaintiff accepted that invitation and entered the hotel with the intention of becoming such. He did not see or learn of any notice nor have any knowledge that the defendant had provided a room and a man in charge where and with whom he could leave his coat, but seeing others whom he speaks of as guests, hanging their coats on hooks evidently provided for that purpose in the office or public room, hung his coat there also. The defendant must be taken to know that the plaintiff had accepted the invitation and offered himself as a guest and hung his coat where he did. There was no need for the defendant to by any act or word, signify that he accepted the plaintiff as a guest. If he did not wish to accept him as such he should have, when the plaintiff entered the inn, so notified him. It appears to me that the plaintiff became a guest from the moment he entered the defendant's hotel with the intention of becoming such, which intention, I think, was well shewn by the plaintiff's conduct. He was a traveller, as such he entered the hotel, took off and hung up his coat, thus shewing an intention to remain which he did and had his dinner. No stronger evidence of intention is required. It was not necessary that he should enter his name in the hotel register. If there was any doubt of his intention, or of him being accepted as a guest up to the time of having his dinner it was then removed and that act, I think, if it be necessary, related back to his entrance into the hotel and his hanging up of his coat. The relation of landlord and guest having once been established the presumption is that that relation continued up to the time in the evening when he declared his intention to, as a traveller, leave the inn and not return again. Having his evening meal puts beyond doubt the continuation of the relation of landlord and guest.

The hanging of his coat on one of the hooks in the public room, even though the hotel was thronged with people, does not prove negligence on the part of the plaintiff. The hooks were evidently, I think, provided for such a purpose and invited such an act. The defendant knew they were being used for that purpose on that day by his guests and if he did not wish them so

used he should have either removed them or insisted on the plaintiff placing his coat elsewhere—in the check room for instance. If then the plaintiff resisted the defendant's insistence and in turn insisted on his coat remaining where he hung it, it may be that the defendant would be free from liability. The defendant cannot be heard to say that he did not know that the plaintiff hung his coat where he did. It was his duty to know, his duty to move it to a place of safety or to safely guard it where it hung. The plaintiff continuing to be a guest up to the time in the evening when he left the hotel to return home had the right to leave the inn for the purpose of seeing the town or any spectacle therein, and to leave his coat where he had hung it, relying on the defendant guarding it safely during his temporary absence.

On the evidence submitted in this action I find that the defendant was on the second day of October, 1906, the keeper of a common inn, known as the Clark House, in the Village of Georgetown; that the plaintiff on that day was a traveller and became a guest at the said inn and that the relation of landlord and guest was established between them; that the plaintiff by hanging up his coat where he did, placed it infra hospitium, that is in the custody of the defendant as innkeeper; that the plaintiff's coat was in the defendant's charge and under the protection of the defendant's inn at the time of its loss; that the plaintiff had no notice of any intention or desire on the part of the defendant to limit his common law liability; that the plaintiff was not guilty of negligence in hanging up his coat and leaving it where he did.

Lest it may be thought I have overlooked the Liquor License Act and the Innkeepers Act I may say they do not bear upon the question in this action.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] GAULT BROS. *v.* MANELL. [March 22.

Bills of Sales Act—Secret agreement—Power to seize goods and book debts of debtor.

Plaintiffs in 1898 agreed to supply M. & S. with goods under an agreement in writing that such goods should remain the plaintiffs' property, and that should the plaintiffs at any time con-

sider that the business of M. & S. was not being conducted in a proper way or to the plaintiffs' satisfaction, plaintiffs should be "at liberty to take possession of our stock, book debts and other assets, and dispose of the same, and after payment in full of any amount then owing to you by us, whether due or to become due, the balance of the proceeds shall be handed to us." The agreement was not filed under the Bills of Sale Act. Goods were supplied from time to time under the agreement. On Feb. 17, 1905, the business not being conducted to the plaintiffs' satisfaction, and M. & S. being insolvent, plaintiffs entered the store of M. & S. by force and took possession of all the stock and effects on the premises, and of the book of account. The stock seized was made up of goods supplied by the plaintiffs of the value of $5,000.00, and of goods supplied by other unpaid creditors of the value of upwards of $10,000. The account book shewed debts due M. & S. of the estimated value of $2,000. Later on the same day M. & S. made an assignment for the general benefit of their creditors.

Held, 1. Plaintiffs were not limited to taking possession of goods supplied by themselves.

2. As to goods supplied by the plaintiffs as the property therein did not pass to M. & S., the agreement was not within the Bills of Sales Act, and that as to goods not supplied by plaintiffs as the agreement was not intended to operate as a mortgage, but as a license to take possession the Act did not apply.

3. While the license in the agreement to take possession of the book debts did not amount to an assignment, and the power given by it had not been exercised by notice to the debtors, plaintiffs were entitled to them as against M. & S.'s assignees.

M. G. Teed, for plaintiffs. *A. I. Trueman*, K.C., and *J. K. Kelley*, for defendants.

Province of Manitoba.

KING'S BENCH.

Macdonald, J.] [April 25.

CANADA PERMANENT MORTGAGE CORPORATION *v.* SCHOOL DISTRICT OF EAST SELKIRK, No. 99.

Duty of new treasurer of municipality to obey precept served on his predecessor by sheriff—Inability to obey the order not always a reason for refusing mandamus.

Under s. 263 of Public Schools Act, R.S.M. 1902, c. 143, for

the purpose of realizing on the execution placed in his hands in this action, the sheriff caused the treasurer of the Rural Municipality of St. Clements, W. R. Young, to be served on 23rd August, 1906, with a precept to levy the necessary rate upon the lands situated in the defendant school district. On 29th October following, Mr. Young resigned and Thomas Bunn was appointed treasurer. Mr. Bunn thereafter made out the general tax roll without including the levy directed by the sheriff. He said he had no knowledge of the proceedings against the municipality until March, 1907, but admitted knowing of the judgment. He had been a member of the municipal council during 1906.

Held, on application for a mandamus to compel Mr. Bunn to levy the rate, that as a member of the council, he should have had knowledge of the proceedings taken, and the plaintiffs were entitled to the order asked for, as the duties of the treasurer upon whom the precept had been served devolved upon his successor in the office.

Held, also, that the inability of the treasurer to obey the mandamus for lack of some preliminary steps required by law to be attended to by other officers of the municipality, over whom he had no control, was not a sufficient answer to the application. *London and Canadian* v. *Morris,* 9 M.R. 377 followed.

A. C. Ewart, for plaintiffs. *Heap,* for defendants.

Mathers, J.] ROSEN *v.* LINDSAY. [May 1.

Deceit—Damages—Liability to make representation good.

Action for damages for deceit in the sale of a hotel property as a going concern. The defendants had represented that the average net profits of the business were $85 a day and that the net yearly profits would be at least $10,000 and produced a book purporting to contain a daily record of the cash receipts for upward of seven months preceding the day of sale, shewing figures in support of such representations. The book, however, had been fabricated for the purpose and the entries in it as well as the representations referred to were false.

After running the hotel for eleven months, during which he made a profit out of the business of over $3,000, the plaintiff sold the property at an advance of $3,000 on the price he had paid defendants for it.

Counsel for the defendants contended that the plaintiff, having lost nothing, had sustained no damage and could not recover.

Held, following *Steele* v. *Pritchard,* ante, p. 258, that the deceived party was entitled to be placed in the same position, so far as damages could do it, as he would have been in if the representations on which he had acted had been true, or, in other words, a man who makes a false representation, intending another to act on it, is bound to make that representation good if the other does act upon it, and that in this case the plaintiff was entitled to recover as damages the difference between the profits which the defendants represented to the plaintiff that he might reasonably expect to make and the profits which he actually did make, making due allowances for differences in management and other circumstances. Verdict for plaintiff for $1,500 and costs.

Hagel, K.C., and *Manahan,* for plaintiff. *A. B. Hudson,* and *A. V. Hudson,* for defendants.

Province of British Columbia.

SUPREME COURT.

Hunter, C.J.] [April 9.

CHANG SHEE HO CHONG *v.* CULLEY.

Endorsement on writ—Statement of claim setting up different cause of action—Directions—Discretion.

The endorsement on the writ asked for the delivery up and cancellation of a certain document, dated the 24th of April, 1906. The statement of claim, when delivered, shewed in effect that the document sought to be declared void was dated Sept. 20, 1906, and was of a different purport.

Held, on an application to strike out the statement of claim as going beyond the endorsement on the writ, that the endorsement was defective and erroneous, but that it might be amended and re-delivered on payment of costs.

Pugh, for plaintiff. *Woodworth,* for defendant.

Irving, J.] REX *v.* BRIDGES. [April 30.

Summary conviction—Habeas corpus—Canada Shipping Act, R. S.B.C. c. 113, *s.* 287*—Disclosure of offence in warrant of commitment.*

It is essential in a conviction to state that the act charged was

wilfully committed, and the omission to do so is fatal to the validity of the conviction. *The King* v. *Tupper* (1906) 11 C.C.C 199, and *Ex parte O'Shaughnessy* (1904) 8 C.C.C. 136 followed.

Lowe, for the motion. *Morphy,* contra.

Book Reviews.

The Lawyers' Reports Annotated, New series, Book 6, BURDETT A. RICH, HENRY P. FARNHAM, Editors. 1907: Rochester, N.Y. The Lawyers' Co-operative Publishing Company. Canada Law Book Company, Limited, 32 Toronto Street, Toronto.

We are in receipt of the above volume which continues this excellent series. We have already referred to these publications at some length. They are a boon to the profession; and are largely in use.

Bench and Bar.

THE BENCH AND THE PRESS.

We have received the following letter from a prominent lawyer in Western Ontario in reference to our criticism of a newspaper which contained some libellous remarks in connection with a recent judgment of the Judicial Committee of the Privy Council. It is given as a sample of the views of the profession on this subject:—"Allow me to compliment you on your article in the current number of your Journal on 'The Bench and the Press.' In these days when every penny-a-liner considers himself equally competent with the judges to interpret the law, it was high time that some such fearless expression of opinion on the subject be given utterance to in an authoritative manner."

Comments of the press outside of Toronto run in the same line. For example, a leading journal in the metropolis of the Dominion says:—"The recent hysterical outbreaks of the newspapers of Toronto against the Judicial Committee of the Privy

Council, because of that tribunal's decision in favour of the Street Railway Company and against the city, prompts the *Canada Law Journal* to read the Toronto daily newspapers a much needed lesson as to the manner in which they should accept the decision of the highest court in the Empire. The *Law Journal* is quite right on the general principle; but we are afraid that, published as it is itself in the City of Toronto, it does not quite realize the real folly of the childish spleen of the Toronto dailies over this street railway decision. One has to live at a distance to understand the true attitude of the Toronto press towards the street railway. It is their one safe topic of abuse, the one subject upon which they can unite without fear of political differences and it would be a pity to deprive them altogether of this hobby horse, even if its riding does involve disrespect for the judges of Canada and of the Empire's court of final appeal."

As might be expected, a Toronto journal comes to the rescue of its brother in these words:—"Following this is an article by the editor of the *Canada Law Journal* on 'The Bench and the Press' in which some of the Toronto daily newspapers are censured for criticising the decision of the Privy Council of the Street Railway action. The *Law Journal* is aghast." The only inaccuracies in the above are, (1) the Toronto daily newspapers were *not* censured for criticising the decision referred to; but for their libellous abuse of the judges. (2) The *Law Journal* was *not* "aghast." It was only disgusted; as were all respectable readers of the newspaper referred to. Other papers in the Province have published the article in full with approval.

Judicial Appointments.

David Grant of the City of Vancouver, B.C., to be junior judge of the County Court of Vancouver. (May 9, 1907.)

Court of Appeal—Ontario.

Those who may be interested will please note that the sittings of this Court after the long vacation, have been fixed for September 16 and November 11, instead of September 3 and November 12.

Canada Law Journal.

VOL. XLIII. JUNE 15. NO. 12.

SUNDAY REST AND RESTAURANTS.

Canada is attracting her population from many quarters of the Globe; the great twentieth century trek of immigration is moving across British America, and Canada is truly the smelting-pot of races. The Anglo-Saxon type of civilization is the most advanced type, and one of its bulwarks is not only a wise legislation regarding a rest day, but also a wise and reasonable interpretation and application of such legislation to the life of the nation and to the lives of the individuals making the nation, and in addition to that (which is a very important addition), a strong and clearly uttered public sentiment in support of such legislation. The basis of our Sabbath observance law is not a specially religious basis, not more so than the basis of any other of our laws, all of which should be based on the moral law, which is the law of the Bible and of regenerated humanity.

We put the Sabbath law, so far as Parliament can enact it, upon national, patriotic, economic and sanitary grounds; a day of rest—one day in seven—as a necessity for the health and growth of the nation, for suprema lex, salus populi. When Parliament has enacted a special day of rest it is then for the pulpit and the teachers and the journalists to convince the nation of the paramount advantage, nay more, the absolute necessity to make it also a day of worship. But the law of the Parliament cannot, should not and does not do that. The essential principle of Parliamentary Sabbath legislation is to abstain from all work except the work of necessity and charity. That principle is as old as the human race. The difficulty of its application to a complex condition of civilization is to define the exception—what are works of necessity or charity (as in the old U.C. Act. c. 104), or work of necessity or mercy (as in Dominion Lord's Day Act, 1906).

In a special case referred to the Court of Appeal regarding the constitutionality of the Ontario Lord's Day Act, certain questions of interpretation were also addressed to the Court and amongst these it was asked three questions as to the meaning of the words "work of necessity," the object being to establish some judicial land marks which would define more exactly the general character of the words. The late Chief Justice Armour gave some answer to these questions, but the Court of Appeal declined to do so, upon the grounds that they related to matters which ought to be left for decision when raised in actual litigation in the application and construction of legislative enactments with reference to an existing state of facts. Mr. Justice Osler remarked that "when they are represented as they here are represented in scena and not in foro—argued and decided academically and not judicially—the answers are likely to embarrass and perplex judges and parties who may afterwards have to deal with such questions or similar questions arising under varying facts and circumstances as they may be presented in actual litigation." The same questions came later before the Judicial Committee of the Privy Council and they also declined to answer them for the same general reasons.

This result was perhaps inevitable. The Dominion Lord's Day Act has enumerated certain specific exceptions as illustrative of the principle of necessity, but it carefully avoids exhausting the "works of necessity," and thus it is that each judge who tries a case affecting Sunday rest must to a large extent introduce into his judgment his own personal views as to what works or acts are necessary on Sunday, such being the result of his own education or environment or sympathy or antipathy—and we would add prejudice if we were referring to ordinary citizens. It is not, however, to be presumed that judges ever have prejudices. As Ovid puts it—"Judicis officium est, ut res, ita tempora rerum,"—"It is the duty of a judge to consider not only the facts but the circumstances of the case." Ovid was not technically a lawyer, but from this quotation it

would appear that he was gifted with the judicial instinct. And as illustrative of the value of such a statement it may be added that a distinguished Lord Chancellor of England quoted this line from the Latin poet. The opportunity for the exercise of what astronomers call the "personal equation" is boundless, and as a consequence the judges may be unconsciously lead to blur the distinction between their duty "jus dicere" (to interpret the law), and the admittedly human tendency "jus dare" (to make the law).

Shakespeare has put into the mouth of the Earl of Suffolk at that historic meeting in the Temple Garden, this honest confession,—

> "Faith, I have been a truant in the law,
> And never yet could frame my will to it,
> And therefore frame the law unto my will."

There is a danger of that very tendency overcoming our judgment even in this present year of grace.

The Sunday law as to restaurants has come before the Courts lately in the case of *Rex* v. *Devins*, when His Honour, Judge Morson, junior judge of the County Court of the County of York, Ontario, decided that a licensed restaurant-keeper could lawfully sell candies and oranges to a customer who carried them away from the premises.

It may here be observed as important that though the selling of an orange or a few candies is in itself a trivial matter, yet it touches a material principle, which should be settled by the highest possible judicial authority. Very often large results are pivoted upon small hinges. It was so in England, when John Hampden declined on principle to pay a few shillings of ship money, which offence was tried by a bench of twelve English judges of the highest authority, and the ultimate results were that England was drenched with blood, a King was brought to the scaffold, and great constitutional rights, involving the liberties of Englishmen, were established. We must not, therefore, turn with impatience from a case where important legal prin-

ciples affecting Sabbath observance are in the weigh-scales of judicial determination.

The restaurant question is not "res integra," for it has already been before our Courts more than once. The first was the case of *Queen* v. *Alberti* (1900), 3 Can. Cr. Cas. 356, where Macdougall, Co. J., the then senior judge of the County Court of York, held that a bona fide restaurant-keeper could, on Sunday, sell to a customer ice-cream to be eaten on the premises, on the ground that it was an article of food and could not be distinguished from other articles of food which might be more substantial. The judge notes the fact that candies were exhibited on the premises, but not offered for sale—evidently it was judicially suggested, if not actually held, that candies were not food. Then followed *Rex* v. *Sabine*, decided by his successor, Judge Winchester, who held that a licensed restaurant-keeper who did not strictly and exclusively supply meals and carry on the business of a victualler, but who obtained his license in order to give him a colour of right to sell ice-cream soda on Sunday, was rightly convicted of a breach of the Lord's Day Act.

Then comes a case decided at London by Mr. Francis Love, P. M., in December last. The defendant there had a restaurant license, and supplied only "short lunches," such as sandwiches, cakes, boiled eggs, etc., and did not serve regular meals on Sunday, but took orders for ice-cream and ice-cream soda alone. The London Police Magistrate followed *Rex* v. *Sabine*, and convicted, criticising *Queen* v. *Alberti* thus,—"I would have preferred to base this decision on the broad ground that an eating-house proprietor, in the fullest sense of the term, is not entitled to sell ice-cream on Sunday, unless it is supplied in conjunction with a regular meal or at a time when regular meals are usually and ordinarily supplied, or when the consumer is taking it for food purposes and as a necessary food and not a confection, but as this would directly contradict *Queen* v. *Alberti*, I do not feel at liberty to do so." These cases were duly prosecuted and seriously defended.

Another case of refreshment sales on Sunday, however, possesses a sort of "opera bouffe" character. An enterprising

and ingenious gentleman on Yonge street, Toronto, who was a druggist, opened his shop wide on Sunday for the ice-cream soda business, and put up a sign intimating to the thirsty public that he only sold ice-cream soda as medicine. His counters were lined with brawny specimens of lusty, rugged humanity, who, adopting the suggestion so obligingly offered by the druggist, silently offered him their dimes and sought to remedy their bodily anguish and to cure the ills that Sunday afternoon flesh is heir to by copious supplies of ice-cream soda. Two unsympathetic plain-clothes myrmidons of the law, as administered by Police Magistrate Denison, sauntered in one Sunday afternoon and received the medical treatment, and thereupon rudely disturbed the little pleasantry by laying an information, and the Police Magistrate quite good-naturedly gave the druggist the benefit, not of the doubt, for there was none, but of his views of the Lord's Day Act, and inflicted the expected fine, which at once stopped the Sunday afternoon ice-cream soda dispensary traffic. It was not observed as a result that the mortality of the city suffered any appreciable increase. There is no recorded appeal against this conviction—it was a one-act comedy. This incident presented a refreshing aspect in more than one sense.

In the case of *Rex* v. *Devins*, to which reference has been made, the test applied by the learned judge appears to have been whether or not candies were a food, and throughout the other cases which we have quoted that test seems to have been applied to a greater or less degree. It is difficult to understand how that can be the guiding or governing principle. In *Queen* v. *Alberti*, the earliest of the series, the learned judge discussed s. 3 of the old English Act of 29 Car. II, c. 7, which excepts from the prohibition of that Act, "the dressing of meat in families or dressing or selling of meat in inns, cook-shops or victualling-houses, for such as otherwise cannot be provided." This section was not inserted in the old Upper Canada Act, c. 104, nor in R.S.O. 1897, c. 246, which was the law when the Alberti judgment was delivered. The judge, however, seemed to desire the benefit of that last section, and thus arose the question what was "meat" or

"food," and what was not "meat" or "food"; in the last analysis, however, he gave the effort up and concluded—"it must probably be assumed that in adopting the provision of 29 Car. II. c. 7, our legislature intentionally omitted to re-enact the proviso. Our Act therefore has to be construed without it, and its omission compels the Court to place a meaning upon the words—'work of necessity'." It may be admitted that candies or confections are scientificially or chemically food, because they contain elements which, taken judiciously, may promote health and sustain life, and may come within the definition of victuals, "which is food, and what mixed with something else constitutes such food." See *Rex* v. *Hodgkinson*, 10 B. &. C. 74.

Is the test then to be whether these articles are food, or is the true principle to be found in the answer to the question, what is meant by "works of necessity or charity"? Let it be remembered also that there is no distinct exception as to food in the prohibition that it is not lawful for a "merchant to sell or publicly shew forth or expose or offer for sale, or to purchase any goods, chattels or other personal property," and the exception of "works of necessity or charity" is connected with the prohibition as to "work" and not as to "sales." There is no exception such as "sales of necessity" in the old Upper Canada Act nor in the new Dominion Lord's Day Act, which is the latest down-to-date elaboration on this subject and the best Lord's Day Act, in a civil sense, the world round and generations through. In that Act there is excepted "words of necessity or mercy" in general terms, and among illustrations of the general principle set forth as specific exceptions only three touch the question of food, and they are: —

(1) The caring for milk, cheese and live animals;

(2) The delivery of milk for domestic use and the work of domestic servants;

(3) The operations connected with the making of maple sugar and maple syrup in the maple grove."

None of these exceptions directly touch "sales of food."

The Dominion Lord's Day Act was the result of the combined

intelligence of our legislators after hearing all that could be possibly said upon the subject from all ranks and conditions of men, and we do not press the conclusion too far when we say that if it had been intended to give restaurants a free hand, the House of Commons would have done so. Let us not forget, moreover, that this Act was the composite result of all shades of Sabbath observance opinion throughout British America. We must, however, consider the spirit of the enactment, and if sales of certain goods are necessary, then we think the words "work of necessity" may be applied to such sales. Now it is perfectly manifest that preparing meals on Sunday is necessary, for health must be protected and life sustained, and the sale of the product of such necessary work must be permitted, or otherwise the preparation of food on Sunday would be useless. A restaurant-keeper is certainly a merchant, for a merchant is defined as "a person who buys and sells commodities as a business and for profit," and therefore a restaurant-keeper is forbidden to sell on Sunday unless his selling be connected with or grafted upon a "work of necessity." A restaurant-keeper may sell lawfully and may sell unlawfully; it is lawful to sell what is necessary, and unlawful to sell what is not necessary. A lawful business cannot protect an unlawful business, even if carried on in the same premises and by the same person. One hesitates to define the word "necessity," as eminent judges have, as above stated, declined so to do, but some principles may be safely laid down which may guide one to a clearer understanding. We would venture to suggest:—

(1) That "necessity" is not a physical or absolute necessity, but a moral fitness or propriety of the thing done under the circumstances of the particular case;

(2) That there is a clear distinction between "convenience" and "necessity";

(3) That necessity must be real, and not fancied;

(4) A necessity must not be voluntarily brought about by the person pleading the necessity.

We are not in the habit of taking the Sunday habits or laws of our American cousins as ideal, for we are rather inclined to

believe that we are in the van in that regard. We find, however, that selling cigars or tobacco is against their law, (see *Mueller* v. *State*, 40 Am. Reports 245), and that selling soda water, even by a restaurant-keeper is also forbidden: *Comm* v. *Hengler*, 15 Pa., Co. Ct., 222. And these are forbidden, not by any particular statute, but under reasoning on a line with what is set forth above.

We question the law laid down in the *Alberti case*, and prefer the view taken by the London magistrate. Candies or ice cream may chemically contain food elements, and may therefore scientifically be food, but the question is, are they food under the principle of "works of necessity" and all that such involves? Will any man seriously contend that it is necessary to sell such toothsome confections to satisfy hunger? for that is really what it comes to. We must on Sunday, without doubt, feed the hungry, but must we cater to the fanciful taste and delicate palate with what are but dainties? But it is answered—after all, it is only a dish of ice cream and a package of innocent candies. That is not an answer. If candies must be bought, and we may without prejudice admit that they are necessary articles of commerce, and pleasant to the eye and gratifying to the palate, whether they belong to the glucose group or the saccharose group, but let those who desire those carbohydrates hie to the emporium on Saturday and lay in a Sunday stock; this safe practice would not in the slightest degree acidulate the honeyed speeches that often accompany chocolates on Sunday afternoon.

Sunday rest must be enforced as a duty to the State. It is said there were 150,000 Sunday toilers in Canada before the Dominion Lord's Day Act came into force, and now as many as 50,000 have been emancipated. For the life of the individual and for the strength of the nation, we must reduce the number of these to a minimum. The position we therefore take is, that confections unconnected with a meal should not be sold at all on Sundays. It is not the question of candy-selling being lawful if eaten on the premises, and unlawful to take them off the premises; that is not the essential rock-bottom principle.

But even on this principle of differentiation much can be said. The word "restaurant" is thus defined in the Standard Dictionary, "A place where refreshments or meals are provided to order; the dining-room of a hotel conducted on the European plan." Webster defines it as an "eating-house"—"It is a place to which a person resorts to for the temporary purpose of obtaining a meal": 10 Fed. Rep. 6; *People* v. *Jones*, 54 Barb. 311, 317. The Imperial Dictionary defines "restaurant" as "an eating-house where provisions may be had ready cooked at all times." In *State* v. *Hogan*, 30 N.H. 268; a "restaurant" is defined as "an eating-house where something to eat, ready prepared, or which can be readily prepared, may be obtained."

From these definitions it would seem that under ordinary circumstances food is bought and consumed upon the premises but not taken away. On ordinary week days this distinction may be rejected, because such a place may partake of the character of an ordinary shop as well as of a restaurant, but on Sunday the shop character must disappear, and the restaurant phase is the only one that can be left.

A very celebrated man of Alexandria, who wrote a book on Geometry, which has caused many generations of school-boys many pangs and many thrashings, has a method of proof called "reductio ad absurdum." Let us now apply his justly celebrated logic, or a logic of a similar character. Let it be supposed that candies, because they are food, can be bought at a restaurant on Sunday and taken away for consumption; then any other food can also be bought and taken away. Therefore fruit, bread, cheese, butter, canned meats, canned vegetables, dried meats, maple syrup, sugar, et hoc genus omne, can be bought and taken away, and under the magic of the decision in *Rex* v. *Devins*,—presto change—the whole Sunday law and custom of the community that has held for a century past is completely altered—which is absurd. Therefore the major premise that candies can be bought and carried away on Sunday is false. For further illustrations see Archbishop Whateley's "Logic."

We have limited the above list to foods ready for consump-

tion. If we extend it to raw or unprepared foods, then the "reductio ad absurdum" becomes a "reductio ad absurdissimum." The only way in which the judgment can be protected is to apply the dictum of Lord Halsbury, in *Quinn* v. *Leathem* (1901), A.C. 506; where it was solemnly held that law was not logical. We observe that the learned judge agrees with what Lord Kenyon said in *Rex* v. *Younger*—"I am for the observation of the Sabbath, but not for the pharisaical observation of it." We all agree with that statement, but in the application we admit the infirmity of not seeing how it affects the point at issue. In *Fennell* v. *Ridler*, 5 B. & C. 406; Bayley J., says:—"The act cannot be construed according to its spirit, unless it is so construed as to check the career of worldly traffic." In *Phillips* v. *Innes*, 4 Clark & Finelly, 246, (the celebrated case involving Sunday shaving, which was held illegal), the Court said—"But the magistrates of Dundee and the Court of Session did make that distinction—rather making an Act of Parliament, than construing an Act." We submit that these quotations are pertinent.

The learned judge also speaks of the "absence of any statutory Lord's Day bill of fare fixing what kinds of food shall be eaten on the Lord's Day." There is a sentence in Bacon's Essay on "Judicature" which may be worth his referring to, and it is this—"Judges ought to be more learned than witty, more reverent than plausible, and more advised than confident."

For the reasons given we are compelled to dissent from the findings both in the *Alberti case* and in the *Devins case*. In our opinion they do not correctly set forth the law on the subject, and our conclusions may be summarized as follows:—(1) The sales of confectionary as a general rule do not on any sound principle come within the scope of the words "works of necessity or charity" or "mercy." (2) The use of Sunday restaurants may be a necessity, for the same reason that hotels are necessary, but there is no justification for them to be regarded as store-houses of food, where food or confectionery may be purchased and carried away for consumption elsewhere on Sunday. If this is per-

mitted the distinction between eating houses and shops not only approaches but reaches the vanishing point.

We understand that by the direction of the Attorney General of the province the question involved in this and other judgments will be tested in a new case and referred for adjudication to a Divisional Court of the High Court of Justice.

LEGAL ETHICS.

It seems absolutely impossible to eradicate the motion which lies unformulated at the basis of such comments that a guilty defendant in a criminal case is not entitled to counsel, and that the lawyer who undertakes his defence degrades himself, and to that extent lowers his profession. It is our boast that we live under "a government of laws, not of men," and the accused is entitled to demand an acquittal or a conviction according to law. According to law he is entitled to counsel, and it is the duty of that counsel to see that before he is pronounced guilty every real and every technical requirement of the law is complied with. If we are indeed living under a government of law, the accused is entitled to the benefit of even the technicalities that the law has created. It is surely a monstrous paradox to say that by insisting upon compliance with the law to the crossing of the last *t* or the dotting of the last *i* one is undermining the respect for law. If for a moment we could conceive of counsel failing to avail themselves of technical defences for their clients on the theory that substantial justice was being done, we should be but a little way from such substantial justice as was meted out in the attainder of Sir John Fenwick (whose case forms a stirring episode in Macaulay's History), because his friends had spirited away one of the two witnesses necessary for his conviction of treason. The locus classicus on the question of a lawyer's right to appear in a cause which he regards as bad is, as every one knows, contained in a conversation between Dr. Johnson and Boswell. The sturdy common sense of the "great moralist" solved the question in a way all the more impressive because he was not a lawyer.

And yet in a recent issue of a great newspaper the fact that Johnson was no lawyer was referred to as if it detracted from the weight of his opinion. Truly a curious idea. But if the opinions of lawyers are desired, that the late Lord Chancellor of England, Lord Halsbury, may perhaps have weight. He characterized as "ridiculous, impossible of performance, and calculated to lead to great injustice," the thesis "that an advocate is bound to convince himself by something like an original investigation that his client is in the right before he undertakes the duty of acting for him." To do so, he added, would be "usurping the office of the judge, by which I mean the judicial function, whether that function is performed by a single man or by the composite arrangement of judge and jury which finds favour with us." When the whole theory of our law, the conduct of trials, and the nature of an advocate's duties are remembered, all this seems too clear for any possible difference of opinion. The lawyer must, of course, stoop to no connivance at an unlawful or guilty method of defence, nor must he lie by stating or intimating to the jury his own individual opinion that the defendant is guiltless. Even though his client is guilty, it is his right and duty to present to the jury the evidence in the most favourable aspect for the prisoner, and to avail himself of all technical advantages. According to our system of administrating justice, truth is struck out between the opposing arguments of counsel each of whom presents his side of the case as strongly as he can. The ultimate decision rests not with the counsel, but with Court and jury. The system may admit of improvement, but as it is the advocate must act for his client with all the ability of which he is master. And by so doing he discharges his duty not only toward the client but to society at large.—*Law Notes.*

It is sometimes found to be a little awkward to be taken at your word. Christian Scientists say there is no such thing as matter and that pain and consequent suffering are quite unnecessary. One of the cult referred to recently sued the Fort Worth Railway Co., for damages to compensate her for physical

and mental suffering that she had been compelled to endure because she was expelled from one of the company's passenger cars. The defendant company set up the plea that the plaintiff should be consistent with her religious belief and contested her right to damages. The trial Judge ruled out the evidence tendered by the defendants as to the creed of a so-callel Christian Scientists, and the jury found against the company. On appeal the Court held that the defendants had a right to put in the evidence saying that "if she had such control of her feelings as she thought she had as to render her insensible to pain, when she willed to be, we see no reason why that circumstance should not have been considered by the jury in determining the extent of her suffering and the compensation to be made on account of it." It is sad to see the potency of the almighty dollar to cause people to fall from grace. As to the legal question involved it seems to be new as well as interesting.

The recent decision of Mr. Justice Riddell, in *Mills* v. *Small*, noted ante, p. 406, appears to be opposed to the decision of the English Court of Appeal in *Fitzroy* v. *Cave* (1905) 2 K.B. 364, (noted ante, vol. 41, p. 751). In that case there was an assignment of a debt and the assignee had covenanted to pay over the amount of the debt when recovered to the assignor less costs, and it was held that the assignment was absolute, and the assignor entitled to recover in his own name.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

ACTION IN REM—ACTION AGAINST PERSON—PUBLIC BODY—STATUTE OF LIMITATION.

The Burns (1907) P. 137 was an action in rem against a vessel to recover damages for a collision. The owners were a municipal body and set up a statute limiting the time for bringing actions for tort against them to within six months next after the act complained of, but Barnes, P.P.D., held that limitation did not apply to an action in rem, and his ruling was affirmed by the Court of Appeal (Collins, M.R., and Cozens-Hardy, and Moulton, L.JJ.)

WILL—CONSTRUCTION—"RESIDUARY LEGATEE"—RESIDUARY DEVISE—SPECIFIC DISPOSITION OF REAL ESTATE AT DATE OF WILL—SUBSEQUENT ACQUISITION OF REALTY—INTESTACY.

In re Gibbs, Martin v. *Harding* (1907) 1 Ch. 465. Joyce, J., was called on to construe a will whereby a testatrix specifically disposed of all the real estate she owned at the date of her will, and thereby named Emily Jane Harding her "residuary legatee." After the date of the will the testatrix acquired other lands, and the question was whether "the residuary legatee" was entitled thereto. The testatrix, had by the will given freehold cottages "free of legacy duty" and she had "bequeathed" other freehold property, but Joyce, J., was of the opinion that as at the date of the will the testatrix had no realty which was not specifically disposed of, the use of words did not indicate sufficiently an intention that "the residuary legatee" was to be also the residuary devisee; he therefore held that there was an intestacy as to the after acquired realty.

WILL—LEGACY PAYABLE BY INSTALMENTS ON LEGATEE ATTAINING SPECIFIED AGE—NO GIFT OVER—DEATH OF LEGATEE BEFORE ATTAINING SPECIFIED AGE—VESTING—INCOME.

In re Couturier, Couturier v. *Shea* (1907) 1 Ch. 470. In this case a testatrix bequeathed a sum of £200 to be set apart for her grandson James, £150 for her grandson John, and £150 for her grandson Fredrick, to be paid respectively as to £50 on

their attaining 21, and as to £50 on their attaining 25, and the balance of £100 to be paid James on his attaining 30 and the balance of £50 to John and Frederick on their attaining 30. James survived the testatrix and attained 21, and received the first installment. He died before attaining 25. The point submitted for Joyce, J. to decide was whether the legacies were vested or contingent. He held that they were vested, and, there being no gift over, the balance of the legacy to James with the interest which had accrued thereon was immediately payable to his personal representative.

WILL—CONSTRUCTION—POWER OF SALE—POWER GIVEN "TO MY TRUSTEES"—EXERCISE OF POWER BY SURVIVING TRUSTEE—MARRIED WOMAN'S PROPERTY ACT, 1882 (45-46 VICT. C. 75) S. 5—(R.S.O. C. 163, S. 7)—REVERSIONARY INTEREST IN LAND.

In re Bacon, Toovey v. *Turner* (1907) 1 Ch. 475. Two points were involved, First, whether a power of sale given to two or more trustees to whom the legal estate in the trust property was devised before any of the Acts giving statutory powers of sale to trustees, could be exercised by surviving trustees, or a sole surviving trustee. Eady, J., held that it could, and that the contrary rule never applied except to a bare power. The second point was whether a married woman who before the passing of the Married Woman's Property Act, 1882, was entitled to a reversion in land, which after the passing of the Act, but before her estate fell into possession, was converted into money, was to be deemed to have acquired such property after the passing of the Act so as to make it her separate property under that Act, and this question the learned judge answered in the negative he holding that the conversion of the land into money gave her no new title.

PRACTICE—ADMINISTRATION—CONCURRENT ACTIONS—CONDUCT OF PROCEEDINGS.

In re Ross, Wingfield v. *Blair* (1907) 1 Ch. 482. There were several concurrent actions for the administration of a deceased person's estate, and the question was as to which of the plaintiffs should be given the conduct of the proceedings. Eady, J., decided that, although the general rule in such cases is, that the plaintiff who first commenced proceedings is the person entitled

to the carriage of the proceedings, yet that rule is subject to an exception where, as in the present case, such person is a creditor whose claim is bona fide disputed, and that in such a case a creditor whose claim is undisputed is to be preferred.

TRUSTEE—ASSIGNMENT BY CESTUI QUE TRUST—RIGHT OF TRUSTEE TO DEMAND DELIVERY UP OF ASSIGNMENT—PAYMENT TO ASSIGNOR OF CESTUI QUE TRUST.

In re Palmer, Lancashire & Yorkshire R. I. Co. v. *Burke* (1907) 1 Ch. 486. On the distribution of a trust fund by trustees, they claimed that on payment of a share to the assignees of one of the cestuis que trustent, they were entitled to call for the delivery up to them of the assignment, to which the assignees objected. Eady, J., held that this claim of the trustees was not well founded, and that the trustees could not properly make the delivery up of the assignment a condition of payment to the assignees.

TRADE NAME—USE OF APPROPRIATED NAME—INJUNCTION—LEGAL INJURY.

Society of Accountants v. *Goodway* (1907) 1 Ch. 489 was an action to restrain the use of a trade name by the defendants. The plaintiffs were an Association of Accountants, incorporated in 1885. They recommended that their members should adopt as a professional designation the use after their names the term "incorporated accountant," and by 1905, that resignation had come to be known to a section of the public as indicating a member of the plaintiff association which by its system of tests and examinations had conferred upon its members the valuable privilege of a recognized status for ability and integrity. In that year the defendant association was incorporated and shortly after its incorporation it recomended its members to adopt the designation of "incorporated accountant" with the addition of the abbreviation "Lon. Asson." The action was brought against Goodman one of the members of the defendant association and that association, claiming an injunction to restrain Goodman from using the addition "incorprated accountant," and also for an injunction against the defendant association from holding out by advertisements or otherwise that its members were entitled to use that designation. Warrington, J., who tried the action held that the words "incorporated accountant" was a fancy name, and not a descriptive term, and had come

to denote membership in the plaintiff association and that the unauthorized use of it by the defendants inflicted legal injury to the plaintiff society, in respect of which it was entitled to maintain an action, and had a pecuniary interest in preventing the defendant association from attempting to infringe the right of the plaintiffs and its members to use that designation as indicating membership in the plaintiff association; and an injunction was accordingly granted against both of the defendants.

COMPANY—RECEIVER AND MANAGER—AUTHORITY TO RECEIVER TO BORROW—BORROWING BY RECEIVER IN EXCESS OF AUTHORITY —INDEMNITY OUT OF ASSETS.

In re British Power & T. Co., Halifax Banking Co. v. *British Power & T. Co.* (1907) 1 Ch. 528. A receiver and manager had been appointed of the defendant company and he had been expressly authorized to borrow £3,000 for the purpose of carrying on the business. He had expended moneys in excess of the amount authorized to be borrowed, and he had also incurred an overdraft at his bankers of £1,500; part of the money had been expended (1) in completing goods ordered by customers before or after his appointment; (2) part in completing goods for the purpose of a show or exhibition; (3) part for rent of business premises, and (4) the £1,500 overdrawn. The receiver had died and his creditors claimed that he was entitled to indemnity for these expenditures out of the assets of the company, which claim was resisted on behalf of the debenture holders at whose instance the receiver had been appointed. Warrington, J., held that as regards the items (1) and (3), as the receiver had reasonable grounds for believing that these liabilities would be met out of the proceeds of the sales of the goods, and it would not have been practicable to apply to the Court for authority he ought to be indemnified as to them; but as to the item (2) that was in the nature of a speculation, and although the overdraft of £1,500 had all been spent on payments necessary to keep the business going, there was no reason why the receiver should not have applied to the Court for leave to make these payments, and having neglected to do so he was not entitled to indemnity in respect of either items (2) or (4).

DEED—MISREPRESENTATION AS TO CONTENTS OF DEED—PLEA OF NON EST FACTUM—MORTGAGE.

In *Howatson* v. *Webb* (1907) 1 Ch. 537 the action was

brought on a mortgage, and the defendant set up as a defence the plea of non est factum. The facts were briefly as follows: the defendant had been a solicitor's clerk and while in that employment several properties had been conveyed to him as the solicitor's nominee, but for the benefit of the solicitor. Having left this employment the solicitor presented to him for signature deeds in reference to the properties so conveyed, and on his asking the nature of the deeds he was informed that they were deeds conveying the properties to the solicitor, and, relying on that representation, he signed the deeds. One of them turned out to be the mortgage now sued on in favour of one Whitaker, to whom the solicitor was indebted, and contained a covenant by the defendant for the payment of the mortgage money. The plantiff was assignee of the mortgage. Warrington, J., held that the alleged misrepresentation being only as to the contents of the deed which, however, was known by the defendant to deal with the property in question, the defence of non est factum failed, and the defendant was liable on the covenant.

VENDOR AND PURCHASER—ERROR IN CONVEYANCE—COMMON MISTAKE—RECTIFICATION—LACHES.

Beale v. *Kyte* (1907) 1 Ch. 564 was an action by a vendor for rectification of the conveyance made to carry out the sale. The contract was made in 1900 and was for the sale to the defendant of three parcels numbered 101, 102 and 103 "on the plan annexed" to the contract. In 1905 the plaintiff sold to another person parcel No. 104, and the vendee of that lot proceeded to build, and in 1906 had nearly completed his building, when the defendant complained that he was encroaching on his land; and on examination of the deed to defendant the plaintiff found that the measurement of the land conveyed to the defendant did not agree with the measurement as shewn on the plan annexed to the contract, but encroached on parcel 104. The plaintiff on discovering the mistake immediately commenced this action. The defendant contended that the plaintiff had been guilty of laches and on that ground was not entitled to relief; but Neville, J., finding on the evidence that there had been in fact a common mistake, held that the plaintiff having commenced his action without delay after discovering the mistake, had not been guilty of any laches, and that the time to be considered is not the date of the instrument, but that at which the mistake was discovered by the plaintiff.

WILL—TRUST FOR ACCUMULATION—THELLUSSON ACT (39 & 40 *Geo.* III. c. 98), s. 1—(R.S.O. c. 332, s. 2(1) D.)—"MINORITY OF PERSON WHO IF OF FULL AGE WOULD BE ENTITLED TO THE RENTS AND PROFITS"—PERSONS BORN AFTER THE TESTATOR'S DEATH.

In re Cattell, Cattell v. *Cattell* (1907) 1 Ch. 567, turns upon the construction of a clause in the Thellusson Act (39 & 40 Geo. III. c. 98), s. 1 (R.S.O. c. 332, s. 2 (1) (*d*)). That clause validates accumulations during "the minority or respective minorities only of any person or persons who under the . . . trusts of . . . the will directing such accumulations would for the time being, if of full age, be entitled unto the rents . . . so directed to be accumulated," and the question was whether or not this provision is confined to the minority of persons born in the life time of the testator directing such accumulation, and Neville, J., came to the conclusion that it is not, notwithstanding the dicta to the contrary to be found in *Haley* v. *Bannister*. (1819) 4 Madd. 275; and *Jagger* v. *Jagger* (1883) 25 Ch. D. 729.

FIXTURES—HIRE-PURCHASE AGREEMENT—EQUITABLE MORTGAGE OF FIXTURES COVERED BY HIRE-PURCHASE AGREEMENT—PRIORITY.

In re Allen (1907) 1 Ch. 575, a company hired machinery under a hire-purchase agreement, under which the machinery, though to be affixed to the company's premises, was nevertheless to remain the property of the vendors, who in default of payment of the monthly payments of the purchase money were to be at liberty to enter and remove the machinery. After the machinery had been affixed the company made an equitable mortgage to a bank of the premises in which the machinery had been placed. The company failed to pay the purchase money, and the vendors claimed the right to remove the machinery which was contested by the mortgagees. Parker, J., held that the mortgagees, having a merely equitable mortgage, took subject to the rights of the vendors of the machinery.

COMPANY—SHARES—TRANSFER TO INFANT NOMINEE—WINDING-UP—CONTRIBUTORY.

In re National Bank (1907) 1 Ch. 582 was an application by a liquidator in a winding-up proceeding to place certain persons on the list of contributories in respect of certain shares of which

it was claimed they were the beneficial owners. The shares in question at the date of the commencement of the winding up had stood in the name of one Sparke, he contracted to sell them pending the winding-up proceedings to a firm of Massey & Griffin, and they nominated one Littlejohn, a clerk in their office and then an infant as transferee; and with the assent of the liquidator the transfer was made to him in April, 1894, and in May, 1894, Littlejohn, with the assent of the liquidator transferred the shares to one Davies, also an infant, and a clerk in the office of Massey & Griffin. In 1896 the liquidator became aware that Davies was an infant, and in March, 1906, calls upon the shares having been made and not paid, the present application to place Massey & Griffin on the list of contributories in respect of the shares so transferred to Davies was launched. Parker, J., held that there being no contractual relationship between Massey & Griffin and the company, they could not be placed on the list; and he also thought that if the liquidator had any equitable right against Littlejohn it had been lost by delay, and he doubted whether he had any right against Littlejohn, as he also was an infant. No application was made as against Sparke, and if it were, the learned judge would not say that it would be successful.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—JUDGMENT—REPUDIATION OF CONTRACT AFTER JUDGMENT—EVIDENCE OF TITLE—INTEREST—COSTS.

Halkett v. *Dudley* (1907) 1 Ch. 590 was an action for specific performance by a vendor in which judgment had been pronounced on 14th January, 1905, directing the usual reference as to title. While the title was being investigated before the Master the defendant applied to be allowed to be discharged from the purchase on the ground that at the date of the contract and at the date of the judgment the plaintiff had not a good title. The Master found that a good title had been made, and that it was first shewn in his office on the 8th December, 1905, when a contract for the release of certain restrictive covenants affecting the property was obtained. The defendant also claimed that the vendor was bound to produce, or procure a covenant to produce, a document of title which was of record in Scotland. With regard to the latter point Parker, J., held that it was not necessary to produce or procure a covenant for the production of the document in question, but that the vendor was bound to give secondary evidence of its contents; and as regarded the right to repudiate

the contract, he held that after a judgment for specific performance that could only be done with the leave of the Court. That although a purchaser on finding out that his vendor is unable to make a good title may promptly repudiate the purchase, yet that after judgment for specific performance (though the title is not made good until after judgment), the fact that the vendor had not a good title at the time of the contract or at the date of the judgment, does not entitle the defendant to repudiate without leave of the Court, and that such leave in the exercise of its discretion ought not to be granted by the Court after a good title has been in fact shewn. He also held that interest did not begin to run on the purchase money until the date the good title was shewn. The defendant having been an unwilling purchaser, and the action having been thereby occasioned, he was ordered to pay the costs of the action up to judgment, and the plaintiff was ordered to pay the subsequent costs down to the time the title was shewn, and thereafter no costs were given to either party.

EXTRADITION—JURISDICTION—FUGITIVE OFFENDER—EVIDENCE OF CRIME PUNISHABLE BY IMPRISONMENT WITH HARD LABOUR FOR TWELVE MONTHS OR MORE—FUGITIVE OFFENDERS ACT, 1881 (44-45 VICT. C. 69), S. 9—(R.S.O. C. 155, S. 3.)

The King v. *Governor of Brixton Prison* (1907) 1 K.B. 696 was an application by a prisoner for a habeas corpus. He had been committed by a magistrate under the Fugitive Offenders Act, 1881, and the question raised was whether there was proper and sufficient evidence before the committing magistrate that the offence of which the applicant was accused was punishable in the Court of the Colony to which he was to be extradited, by imprisonment with hard labour for twelve months or more: (see R.S.C. c. 155, s. 3). The offence charged was larceny, in the Colony of Victoria, in the year 1898, and the only evidence of the law of Victoria, was a statement by a senior police constable, that larceny was punishable by the Crimes Act, 1890, of Victoria, with hard labour for a term not exceeding five years.

The Divisional Court, (Lord Alverstone, C.J., and Darling, J.,) held that Colonial law can only be proved like foreign law by the evidence of experts, and that the evidence of the constable was not sufficient; and that though it was competent for the Court to remit the case to the magistrate to receive further evidence, yet having regard to the fact that the offence had been committed so long ago, and that the applicant had endeavoured

to make reparation, and had since been leading an honest life, they thought the interests of justice would be best served by discharging the prisoner which was accordingly done.

VOLUNTEER CORPS—COMMANDING OFFICER ORDERING GOODS FOR CORPS—LIABILITY.

Samuel v. *Whetherly* (1907) 1 K.B. 709. In this case the defendant's testator was the commander of a volunteer corps and had personally ordered a supply of goods from the plaintiff for the use of his corps, and the question was whether he had thereby made himself personally liable for payment thereof. Walton, J., held that he was personally liable and judgment was accordingly given against the defendant for the amount claimed which was over $11.000.

GAMING AND WAGERING—GAMBLING IN FOREIGN COUNTRY—LOAN FOR GAMBLING—CHEQUE GIVEN FOR GAMBLING—GAMING ACT, 1710. (9 ANNE C. 14) S. 1—GAMING ACT, 1835 (5-6 WM. IV. C. 41) S. 1—(R.S.O. C. 339, S. 1).

In *Moulis* v. *Owen* (1907) 1 K.B. 746 the plaintiff sought to recover a cheque given by the defendant in Algiers, drawn on an English bank, partly in payment of money lent by the plaintiff to the defendant to enable the defendant to gamble at cards in Algiers, and the balance in payment of money won at cards by the plaintiff at Algiers. According to the law of France the consideration for the cheque was legal. Darling, J., who tried the action gave judgment for the plaintiff, but the Court of Appeal (Collins, M.R., and Cozens-Hardy and Moulton, L.JJ.,) held that the case was governed by English law, the cheque being drawn on an English bank and payable in England; and that according to the Gaming Act, 9 Anne c. 14, s. 1, as amended by 5-6 Wm. IV. c. 41, s. 1, (R.S.O. c. 339, s. 1), the cheque must be deemed to have been given for an illegal consideration, and therefore the plaintiff could not recover, Moulton, L.J., however, dissented, on the ground that the Statute of Anne applies, in his opinion, only to gaming in England and did not apply to gaming in other countries where it was not unlawful.

SHIP—CONTRACT OF CARRIAGE—CONSTRUCTION—DAMAGE CAPABLE OF BEING INSURED.

In *Nelson* v. *Nelson* (1907) 1 K.B. 769 the Court of Appeal (Collins, M.R., and Cozens-Hardy and Moulton, L.JJ.) have

affirmed the judgment of Bray, J., (1906) 2 K.B. 804 noted ante, p. 246.

SHIP—CHARTER—PARTY—DEMURRAGE—LAY DAYS, SUNDAYS AND HOLIDAYS EXCEPTED—WORK DONE ON SUNDAYS AND HOLIDAYS.

Whittall v. *Rahtken's Shipping Co.* (1907) 1 K.B. 783 was an action by the plaintiffs' the charterers of the defendants' vessel to recover money paid under protest for demurrage. The charter-party provided that thirteen running days, Sundays and holidays excepted, should be allowed the plaintiffs for loading the cargo. By direction of the plaintiffs, however, work was done in loading the ship on a Sunday after the lay days had begun to run and before they had expired. Bray, J., held that the proper inference was that by agreement of the parties that day was to be included in the lay days and that, in the absence of any evidence to the contrary, the same inference should be drawn when the work is done on the Sunday and holiday whether by the direction or at the request of the charterer or not. The charter-party also provided that the time in shifting port was to count as a lay day, and it was held that where the vessel at the charterers' request shifted port on Sunday, that day was to be included in the lay days. The plaintiffs' action therefore failed.

SHIP—SEAMAN—CONTRACT OF SERVICE—CARGO, CONTRABAND OF WAR—REFUSAL OF SEAMAN TO PROCEED—ORDER OF NAVAL COURT—MERCHANTS SHIPPING ACT, 1894 (57-58 VICT. C. 60), S. 225, SUB-S. 1 (C), S. 243.

Hutton v. *Ras SS. Co.* (1907) 1 K.B. 834. Action by a seaman to recover wages. It appeared that he shipped on board a vessel on a voyage for Port Arthur, on arriving at Yokohama the plaintiff refused to proceed on the ground that the cargo included contraband of war. A Naval Court was assembled at Yokohama at the instance of the master by the British Consul, and the plaintiff was tried and found guilty of refusing to obey lawful orders, and the Court found the plaintiff was guilty, and his plea that the carriage of contraband vitiated his contract was held to be without force, and the Court ordered the plaintiff to be discharged. Lord Alverstone, C.J., who tried the action held that the order of the Naval Court concluded the plaintiff, and he dismissed his action: and his decision was affirmed by the Court of Appeal (Barnes, P.P.D., and Farwell and Buckley, L. JJ.).

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Full Court.] OWEN *v.* MERCIER. [April 22.

Vendor and purchaser—Contract for sale of land—Delivery of registerable conveyance—Immoral purposes of purchaser—Rescission of sale.

Appeal from judgment of Boyd, C., reported 12 O.L.R. 529. Appeal allowed and action dismissed with costs throughout.

As between the plaintiff and the vendee the transaction had been completed when the deed was sent back to him for correction. Whatever difficulty the omission in the description may have given rise to as regards its registration, the conveyance was operative to pass the property, the fault in the description merely rendering it equivocal, and causing latent ambiguity which might be rebutted and removed by extrinsic evidence. The plaintiff could derive no right under the condition inserted even if in form valid, because made without consent after the execution and delivery of the deed.

Per MEREDITH, J. A.:—If the condition inserted be a common law condition, as it seems to be, it might be contended to be void as infringing upon the rule against perpetuities.

Middleton, for defendant, appellant. *C. A. Moss*, for respondent.

HIGH COURT OF JUSTICE.

Anglin, J.] RE TAYLOR *v.* MARTYN. [March 8.

Vendor and purchaser—Making title—Discharge of mortgage by executor—Registering probate—Local improvement rates—Covenant in agreement to convey free from incumbrances—Executions and general registrations.

On an application under the Vendors and Purchasers Act, R.S.O. 1897, c. 134, on making title.

Held, 1. As the vendor was entitled to a registered title the vendor was bound to register the probate of the will of a deceased mortgagee whose executor had given a discharge in 1888.

2. Under an agreement that the vendor "would convey the lands freed and discharged from all incumbrances" local improvement rates were not apportionable as "taxes rates and assessments" and must be removed; but

3. The purchaser must satisfy himself by the usual searches as to entries in the general register and executions affecting the lands in the hands of the sheriff.

Luscombe, for purchaser. *Buchner,* for vendor.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [March 27.

GENTLES *v.* CANADIAN PACIFIC RY. CO.

Estoppel by conduct—Unpaid accounts receipted at request of agent—Action against principal.

Where a debt or obligation has been contracted through an agent and the principal is induced by the conduct of the creditor to reasonably believe that the agent has paid the debt or discharged the obligation and in consequence of such belief pays or settles or otherwise deals to his prejudice with the agent, the creditor is not permitted to deny as between himself and the principal that the debt has been paid or the obligation discharged; and in a case where a railway engineer who was supplied with money by the railway company to pay for supplies and the board of his men, being credited with the amounts of the receipted accounts as they came in, and who had induced a firm of hotel keepers who had furnished both, to receipt the accounts in advance on the representation that the company as part of their system required receipts before they would pay the accounts.

Held, that the company were justified in relying on these representations, that the accounts were paid; and as they had altered their position (the engineer having left their employment without accounting) on the faith of them, the hotel keepers were estopped from setting up to the prejudice of the company that the accounts were not in fact paid.

Judgment of MAGEE, J., reversed.

Angus MacMurchy and *John D. Spence,* for the appeal. *Robert McKay,* contra.

Divisional Court, Ex.D.] [April 19.

DUNN *v.* MCCALLUM.

Mechanics' liens—Lien of material man—Registration of one lien against three separate owners—Validity of.

Where the owners of three separate parcels of land made three separate contracts with a contractor for the erection of houses on their respective parcels, and materials were furnished by a material man to the contractor which were used by him in the erection of the three houses, such material man is not empowered, under the Mechanics' Lien Act, to register a lien against all the lands jointly.

Judgment of FALCONBRIDGE, C.J.K.B., reversed.

Bicknell, K.C., for plaintiff, appellant. *Middleton* and *Forster,* for the other parties.

Divisional Court, Ex.D.] [April 19.

REX *v.* HOLMES.

Police magistrate—Appointment for town—Ex officio justice of the peace for county—Jurisdiction over offences in another town.

A police magistrate appointed for a town, notwithstanding he has jurisdiction as a justice of the peace for the whole country, has no jurisdiction to act at the trial of an offence committed in another town for which there is a police magistrate, except at the general sessions, or in case of illness or absence, or at the request of such other police magistrate.

MAGEE, J., dissented.

Frank McCarthy, for defendant. *Cartwright,* K.C., for the Crown.

Divisional Court.] FAULKNER *v.* GREER. [April 22.

Trespass—Wrongful removal of timber from lands—Subsequent sale—Measure of damages.

The husband of the plaintiff in an interpleader issue conveyed certain lots in June, 1905, to his wife for valuable consideration. Prior to this deed but without his knowledge or that of the plain-

tiff, certain timber was cut and removed from the lots without any colour of right. The parties who had committed this trespass sold some of the timber to the defendants to this issue, who purchased bona fide, and subsequently sold the same to another bona fide purchaser. The plaintiff thereupon brought an action against these two purchasers for damages for cutting and taking the timber and for a declaration that as against them she was entitled to the proceeds of the timber. The second purchaser obtained leave to pay the purchase money into Court, and this issue was directed to determine the rights to it as between the plaintiff and the first of the above purchasers.

Held, that the plaintiff was entitled to recover only so much of the said purchase money as represented the value of the timber taken to the plaintiff as standing on the land, and she was not entitled "to fasten upon any increment of value which from exceptional circumstances might be found to attach" to the timber, as for example, by reason of the transportation of the timber to the place where it was ultimately sold. The balance of the said purchase money must be paid out to the defendants in the issue.

W. Blake, K.C., for defendants, appellants. *C. A. Moss*, for plaintiff.

Divisional Court.] [May 6.

MORRIS *v.* CAIRNCROSS.

Landlord and tenant—Tenant for years—Liability for permissive waste—Covenants in lease—Construction.

Held, after detailed review of the cases, that *Yellowly* v. *Gower* (1855) 11 Exch. 274, which decided that a tenant for years is liable for permissive waste, was rightly decided, and that this authority has not been impugned or affected by any subsequent case or displaced by the provisions of the Judicature Act.

Held, also, that the provisions in the lease in question in this case, whereby the covenants to repair and to repair according to notice were qualified by the exceptions in the covenant to leave the premises in good repair, namely: "reasonable wear and tear and damage by fire or tempest"—did not have the effect of relieving the tenant from any liability which but for this he would have been subject to for permissive waste.

Raney and *A. Mills*, for plaintiff. *C. A. Moss*, for defendant.

Divisional Court.] [May 20.

SIMPSON *v.* TORONTO & YORK RADIAL CO.

Negligence—Tram car—Passenger projecting head—Accident.

Action for damages. On September 4th, 1905, the plaintiff boarded a car of the defendants at Long Branch for Toronto, and as the car was crowded and he wished to smoke he stood on the rear platform of the car. He leaned back over the wire gate of the car, which was quite low, in order to expectorate, and in so doing was struck by a post belonging to the defendants and used by them for their trolley-wire.

Held, upon the whole case that there was ample evidence upon which the jury could as they did find the cause of the accident to be the negligence of the defendants, and a nonsuit was properly refused. The extent to which the head of the plaintiff was projected was not such as to make his act negligence per se and it was rightly left to the jury to say whether his act under the circumstances was negligence at all.

The Massachusetts rule that if one riding on a car with his elbow or arm projecting out of the window sustains an injury he is guilty of want of due care which will prevent him from maintaining his action, dissented from.

Robinette, K.C., and *C. A. Moss,* for defendants, appellants. *Loftus,* for respondent.

ASSESSMENT CASES.

IN RE VOKES ASSESSMENT.

Assessment—Removal from one municipality to another after assessment fixed—Change of investment.

V. residing in Toronto was assessed in 1902 for $10,000 on personal property and $1,990 on realty, for the year 1903. In 1903 he paid taxes on the $1,990, but objected to pay on the whole of the $10,000, as he was not residing in Toronto in 1903 and had invested part of that sum in real property in another municipality.

Held, that, nevertheless, he was liable to pay taxes on the whole assessment.

[TORONTO, Nov. 2, 1906.—Winchester, Co.J.

This was an appeal from the Board of Assessment of the City of Toronto, to the County Judge of the County of York.

In 1902 Mr. Vokes, the appellant, while residing on Will-

cocks St., Toronto, was assessed $10,000 on personal property and $1,990 on real estate, making together $11,990.00. There was no appeal from the assessment, the amount of same having been arranged by Mr. Vokes and the Assessment Department on July 10, 1902. The tax on this assessment was payable in 1903, The tax on the real estate was duly paid. In November, 1902, Vokes invested $7,600 of the monies of his personal property assessed as above in a house in the Township of York, and in February, 1903, he invested a further sum of $2,100 in a house on Palmerston Avenue. In December, 1902, he removed to the Township of York, where he has lived since then and where he paid taxes, in 1903, on the houses purchased by him as above.

Gideon Grant, for appellant, contended that by reason of not residing in Toronto during the year 1903, he was not liable to pay taxes assessed on his personal property in Toronto in the year 1902, for the tax year 1903, and that as he had already paid taxes on a part of the personal property so assessed in 1902 by paying same on the property in which he invested his monies in the Township of York he should not be called to pay a double taxation on the same property.

W. C. Chisholm, contra.

WINCHESTER Co., J.—The Assessment Act in force in the years 1902 and 1903 being R.S.O. c. 224, ss. 58 and 59, provided for the taking the assessment of all property in Toronto prior to the 30th September, and by sub-s. 5 of s. 59 it was provided that "The assessment so made and completed may be adopted by the council of the following year as the assessment on which the rate of taxation for such year following shall be fixed and the taxes for such following year shall in such case be levied upon the said assessment." Accordingly the assessment made in Toronto during the year 1902, and confirmed as required by the statute, was adopted by the council of the following year as the assessment on which the rate of taxation for 1903 should be fixed and the taxes for 1903 were levied upon the assessment for 1902.

There is no dispute as to the legality of the assessment of 1902 for 1903, and it must therefore be held that the personal property for which Mr. Vokes was assessed was properly assessed to him in 1902 for 1903. Neither is there any dispute that the tax rate of 1903 was made or fixed on the assessment of 1902 pursuant to the statute and the city by-law and the same was entered on the rolls placed in the collector's hands for collection by levy, etc., as provided by the statute.

In my opinion the liability of a party to pay his tax is fixed by the provisions of the Assessment Act from the time he receives the notice of his assessment notwithstanding the tax is not payable thereon until the following year, provided of course that the assessment becomes confirmed and the party assessed is not entitled to any exemption.

If the party assessed moves from the city after the confirmation of such assessment into another municipality taking the assessed property with him he is not thereby relieved from the liability to pay his tax on such property when it becomes due and payable even should he be compelled to pay a tax on such property by the municipality into which he moves. I can find no decided case in our courts on the point, but in the American reports there are some cases similar to the present one in principle. I refer to *DeArman* v. *Williams,* 93 Mo. 158. In that case the plaintiff resided in Johnson County, Missouri, on the 1st June, 1882, and had on hand money of his own amounting to $2,135.00 which the assessor of that county duly assessed for estate and county purposes between that date and 1st December, 1882. In January, 1883, the plaintiff moved to Bales County taking the money with him where he invested the same in a stock of goods and took out a merchant's license and paid the license tax for 1883. The defendant, collector of Johnson County, issued a tax bill to the sheriff of Bales County to levy on plaintiff's goods. Black, J., in his judgment after reciting the above facts says—"The assessor is required to make the assessment between the 1st of June and January (this includes all property owned on the 1st June)—plaintiff being a resident of Johnson County from June 1st to December, 1882, his personal property was liable to taxation in the county for the year known as the tax year of 1883. His subsequent removal to Bales County did not prevent the officer of Johnson County from extending and collecting the tax nor does the fact that he in 1883 invested the money in a stock of goods and paid a merchant's license in Bales County for 1883, relieve him from the payment of the Johnson County tax."

In the case of *The City of Kansas* v. *Johnson,* 78 Mo. 661, the law requires every person owning property on the 1st of January to pay a tax thereon for the fiscal year beginning on the 3rd Monday of April thereafter. Johnson had a merchant's license tax for the year ending April 15th, 1878, and another on an entirely different stock of goods for the year ending in 1879. He sold the first stock of goods in March, 1878, and the

goods were then removed from the State. Still it was held that he must pay the tax for that stock also for the fiscal year of 1878 because he owned the goods on and after the 1st of January, 1878.

In *Warner* v. *Weneer Treasurer, etc.*, 14 Wis. 396, after setting out the sections of the Code relating to the duties of assessors and mode of assessing as also the facts of the case, Cole, J., says: "From these various provisions of the law we think it clear that the liability of a party to pay his tax is fixed from the time he receives the notice, and if he afterwards changes his residence it cannot affect this liability for that year. It is certainly very desirable and important that some definite and specific rule be adopted as to the place where a party should pay his taxes."

It was argued that Mr. Vokes, if required to pay the tax in question, would thus be made to pay double taxes on the same property. Even if this were so there is no means by which he can escape paying these taxes that I am aware of; but, as a matter of fact, he does not pay a double tax. During the year in which he was assessed in Toronto he did not pay any taxes on such assessment; it is no doubt true he may have been subject to a tax, but that was on the assessment for the preceding year so that during the year in which he was first assessed he paid no tax.

I am therefore of opinion that Mr. Vokes is liable to pay the taxes for 1903 as fixed on the assessment of his personal property in the year 1902.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] WINSLOW *v.* RICHARDS CO. [May 21.

Agreement—Option—Assignment—Renewal and modification of option—Rights of assignee.

An option was held by R. upon property of defendant company for the sum of $562,586. By agreement dated August 7, 1903, reciting the option and that the company had arranged through R. to execute an option to P. and C. for $640,000, it was witnessed that if the property was purchased in accordance with such option, "or mutual modification of the same," the

company would pay to R. or his assigns, any excess realized above the option price of $562,586. R. immediately afterwards assigned a one-half interest in the agreement to the plaintiff. By agreement of the same date, the company gave an option on the property to P. and C. for $700,000, who in case of a sale by them under that option or any mutual modification thereof were to be allowed $60,000. This option expired March 1, 1904. On October 27, 1904, a new option was given by the company to P. and C., and this by subsequent agreements was extended to June 15, 1905. On June 10 P. and C. agreed to sell the property to I. P. Co. for $725,000. This agreement fell through. On October 2, 1905, a sale was made to I. P. Co. for $675,000. By agreement of the same date the defendant company agreed to pay P. and C. $100,000 for their services in connection with the sale, leaving $575,000 as the net amount to the company from the sale. Prior to the sale the company having no notice of the assignment by R. to the plaintiff had agreed with R. that his option should be for $580,000. The plaintiff claimed one half of the difference between the sum realized by the company from the sale and $562,586.

Held, that under the circumstances the option given after the expiry of the first option to P. and C. was a modification of it within the meaning of the agreement with R., but that the company having no notice of plaintiff's assignment were free to deal with R., and that consequently the change made by R. in his agreement with the company was binding on the plaintiff.

A. O. Earbe, K.C., for plaintiff. *Currey*, K.C., and *McLellan*, for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [April 19.

COUCH *v.* MUNICIPALITY OF LOUISE.

Municipality—Accident—Non-repair of highway—Work done on portion of road distant from point of accident—Notice of non-repair.

By sub-s. (a) of s. 667 of the Municipal Act, R.S.M.

1902, c. 116, the liability of a municipality for damages sustained by any person, by reason of default in keeping a public road in repair, is "limited to that portion of the road on which work has been performed or public improvements made by the municipality."

The defendants made public improvements on the road allowance in question to the east of a deep ravine which crossed it, and the owner of the land at that point permitted travellers to go on his land around the ravine to or from that portion of the road allowance to the west of the ravine from which access was had to an intersecting highway farther west.

The obstruction which caused to the plaintiff the damages sued for was a barbed wire fence which had been placed by a private individual on the road allowance at a point a considerable distance west of the ravine, and the municipality had performed no work nor made any improvements upon that porion of the road. The work done on the east of the ravine, however, together with the detour around the ravine, enabled the public to make use of the whole road, and so to travel between that part of the country east of the ravine and a market town situated to the west of the point where the accident took place, and it was for that purpose that the improvements to the east of the ravine had been made.

Held, HOWELL, C.J.A., dissenting, that the road allowance at the point where the accident occurred was, within the meaning of the statute, a portion of the public highway on which work had been performed by the municipality and therefore it was liable, as the obstruction had been allowed to remain on the road for more than three months, and notice of its existence there should be imputed to the defendants notwithstanding the absence of direct evidence of knowledge of it. The result would be different in the case of a partially completed work looking to the ultimate opening up of an extension of the road, the accident happening beyond where the work had been done.

Appeal from verdict of County Court judge in favor of the plaintiff, dismissed with costs.

McLeod, for plaintiff. *Hough,* K.C., for defendants.

KING'S BENCH.

Mathers, J.] ROSS *v.* MOON. [May 1.

Contract—Sale of several articles together, some only supplied—New contract subject to terms of old one—Sale of goods—Implied warranty—Interest.

Action for the price of an engine, and other articles of machinery supplied by plaintiffs to defendants in pursuance of a written contract. This contract called for the furnishing at the same time of a number of articles in addition to those actually supplied.

The statement of claim was founded upon the original contract, but the evidence shewed that the defendants had made a new bargain under which they accepted the machinery actually delivered on the plaintiffs promising to pay the freight and to allow for the articles not delivered.

Held, that the plaintiffs should be allowed to amend the statement of claim and should then have judgment for the contract price less the freight and the cost of the articles not delivered.

Defendants contended that the written agreement was superseded by the new arrangement and the plaintiffs could only rely upon an implied agreement to pay what the good were worth, subject to the implied condition, under sub-s. (a) of s. 16 of R. S.M. 1902, c. 152, and they were reasonably fit for the purposes for which they were sold.

The original agreement, however, contained a proviso that "in the event of changes being made in machinery or terms mentioned in this contract; or any changes whatever, such changes are in no way to supersede or invalidate this contract but it is to remain valid, binding and in full force in all its clauses except in so far as relates to the specific changes.

Held, that full effect must be given to this proviso and that all the provisions of the original contract, except those modified by the new bargain, remained in full force.

The contract contained the usual printed warranty followed by the clause: "All warranties are to be inoperative and void in case the machinery is not settled for when delivered." It was not "settled for," and therefore any warranty covered by the expression "all warranties" in that clause became inoperative and void; but it should be held that that expression only referred to the printed warranty immediately preceding, and any im-

plied warranty under the 16th section of the Sale of Goods Act, would still remain unless, as provided in sub-s. (d), the express warranty was inconsistent with the implied warranty under sub-s. (a). The learned judge, having found on the evidence that the machinery was reasonably fit for the purposes for which it was sold,

Held, that it was not necessary to decide whether such warranties were consistent or not.

Held, also, that the plaintiffs were only entitled to interest at the statutory rate of 5 per cent. per annum, although it was stipulated that, if notes were given, they would carry interest at a higher rate. The notes were not given, and the plaintiffs' right to recover depended on the further provision in the agreement making the whole purchase price in that event due and payable forthwith. In this latter event there was no provision for the payment of interest.

Fullerton and *Blackwood*, for plaintiffs. *Burbidge*, for defendants.

Mathers, J.] [May 2.

RAT PORTAGE LUMBER CO. *v.* EQUITY FIRE INSURANCE CO.

Practice—Particulars—Order for, when and for what purpose made.

Appeal from an order of the referee requiring plaintiffs to furnish particulars of their reply to the statement of defence. The only material filed in support of the motion was an affidavit identifying the pleadings.

Held, that, the pleadings being closed, particulars could not be required with a view to have the prior pleading made distinct enough to enable the applicant to frame his answer thereto properly: *Smith* v. *Boyd*, 17 P.R. 467.

After the pleadings are closed, particulars may, in a proper case, be ordered for the purpose of saving expense, or for the purpose of presenting surprise at the trial. But it must be shewn by affidavit or otherwise, independently of the pleadings, that particulars are needed for either of those purposes.

Gourond v. *Fitzgerald*, 37 W.R. 55, 265; *Thompson* v. *Berkley*, 31 W.R. 230; *Bank of Toronto* v. *Insurance Co. of North American*, 18 P.R. 27, followed.

Appeal allowed and order for particulars, discharged with costs.

Anderson, for plaintiffs. *Clarke*, for defendants.

Province of British Columbia.

SUPREME COURT.

Martin, J.] WHEELDON *v.* CRANSTON. [May 7.

Mining law—Placer claim—Location under obsolete Act—Re-location under existent Act of discovery or error—Formal abandonment, whether necessary in such circumstances—Representation — Work done on adjoining claim—Placer Mining Act, R.S.B.C. 1897, *c.* 136—*B.C. Stat.* 1901, *c.* 38.

Where a placer claim has been erroneously located pursuant to the provisions of an obsolete statute, it is permissible to relocate it in accordance with the existent statute, and no formal abandonment is necessary.

Adopting the principle laid down in *Woodbury* v. *Hudnut* (1884) 1 B.C. (Pt. 2) 39, the work done by a miner making a cut through an adjoining claim with the consent of the owners for the better working of his own claim must be held to be a representation of his own claim.

Where one post was made to do joint duty on the common boundary line of two claims, the names of the two claims being written on the side of the post facing the respective claims.

Held, that the object of the statute requiring due marking had been accomplished.

S. S. Taylor, K.C., for plaintiff. *A. M. Johnson,* for defendant.

Irving, J.] [May 17.

COTTON *v.* CITY OF VANCOUVER.

Municipal law—Streets, property of corporation in—"Vest," meaning of.

Sec. 218 of the Vancouver Incorporation Act, 1900, provides in part that every public street . . . in the city shall be vested in the city (subject to any right in the soil which the individuals who laid out such road, street, bridge or highway may have reserved). In an action for an injunction to restrain the corporation from digging and blasting for the construction of a drain on a street within the corporate limits, plaintiffs submitted

that the construction of the word "vest" as used in s. 218, did not authorize the corporation to dig to an excessive depth.

Held, adopting the ruling in *Roche* v. *Ryan* (1891) 22 Ont. 107, that the word "vest" was not a vesting of the surface merely, but is wide enough to include the freehold as well, but

Held, on the evidence, that it had not been shewn by plaintiffs that substantial or irreparable injury would be sustained by them through the construction of the drain.

Wilson, K.C., for plaintiffs. *Cowan*, K.C., for defendants.

Hunter, C.J.] A. *v.* B. [May 17.

Divorce—Alimony, whether grantable to wife obtaining a divorce on account of impotence.

The wife obtained a decree of divorce on the ground of impotence on the part of the husband, and on an application for permanent alimony objection was taken that there was no jurisdiction, as there was never a valid marriage.

Held, on the principle that a marriage annulled on the ground of impotency is not void ab initio, but voidable only at the instance of the aggrieved spouse ,that the wife was entitled to permanent alimony.

Macdonell, for the applicant. *Davis*, K.C., contra.

Book Reviews.

Tristram and Cootes' Probate Practice, by A. C. Forster Boulton. Fourteenth edition, London: Butterworth & Co., Bell Yard. Canada, The Canada Law Book Company, Limited, Toronto, 1907.

Whilst it is of course unnecessary to do more than state that this is a new edition of the great English work on Probate and Administration Practice, it is nevertheless desirable to call attention to the fact that this is an edition prepared by Mr. Forster Boulton, with a special reference to the use of this work in Canada. We have in Mr. Weir's book on Probate, Administration and Guardianship a useful summary, but we have in the book before us a more exhaustive treatise, in fact a mine of in-

formation on this important branch of law. The editor claims to refer to all cases that have been decided by the Canadian Courts, besides all rules and statutes which appear upon the text; as he says, this will be helpful in aiding in the assimilation of English and Canadian law, and "forging another link in the chain of common jurisprudence in the two countries." A glance at the preface to the first edition published in 1858 shews the development which has taken place since the time when the Proctors at Doctors Commons "made this part of their art a mysterious property, in the knowledge of which neither the public nor the general profession should participate."

An Epitome of Constitutional Law and Cases, by W. H. HASTINGS KELKE, M.A., Barrister-at-law. London: Sweet & Maxwell, Limited, 3 Chancery Lane, 1907.

This little book of one hundred and ninety pages, is founded on Broom's Constitutional Law, and is in fact an elementary treatise giving a connected sketch of constitntional law as a whole, with occasional full abstracts of the leading cases. It may be looked upon as an introduction to the larger works of Dicey and Anson; compact and very readable.

Trades' Union Law, by HERMAN COHEN, Barrister-at-law. Second edition, London: Sweet & Maxwell, Limited, 3 Chancery Lane, 1907.

Trade unions have come to stay, and trade union law, as the author remarks, "is now mainly a code for the regulation or non-regulation of the internal affairs of the societies, and the Taff Vale controversy is becoming a thing of the past." The historical parts have therefore been eliminated from the present edition. The contents are the various acts affecting the subject matter with annotations and references to decided cases.

United States Decisions.

OPTION.—A broker who finds a person who takes an option upon the purchase of a certain mining property, which is never carried out, is held, in *Crowe* v. *Trickey,* Advance Sheets, U. S. (1906) 275, to have no right, where the owner dies before the

option expires, to recover his agreed commission from the administrator, when the latter, after the expiration of the option, sells the property to the same person and at the same price.

DEED.—A ditch constructed by the landowner to relieve a portion of his land of surface water and convey it to another portion, where it is valuable for irrigation purposes, which is plainly visible upon the ground at the time he sells the latter portion, is held, in *Fayter* v. *North* (Utah) 6 L.R.A. (N. S.) 410, to pass, together with the water flowing thereon, under the words "privileges and appurtenances," in the deed.

NEGLIGENCE.— A volunteer who, having been warned of the danger of approaching a broken electric wire which he knows to be uninsulated and to carry a current for lighting purposes, and to have shocked another into insensibility, approaches the wire for the purpose of determining whether or not it is still alive, is held, in *Carroll* v. *Grande Ronde Electric Co.* (Or.) 6 L.R.A. (N.S.) 290, to be guilty of such negligence that no recovery can be had for his death, in case he places his hand within the danger zone, and a shock from the wire kills him.

A report made to the claim agent of a street railway company by the conductor and motorman of an electric car, of an accident in which a passenger was injured, which was made pursuant to a standing rule of the company for the information of the claim agent, as a basis for settlement or for use of counsel in case of suit against the company, is held, in *Re Schoeph* (Ohio) 6 L.R.A. (N.S.) 325, to be a privileged communication, the production of which cannot be enforced in the taking of depositions before the trial in a suit against the company for injury received in such accident.

STREET RAILWAY.—The title to the rails, poles, and other appliances for operating a branch of a street-railway system remaining in the streets at the expiration of its franchise is held, in *Cleveland Electric R. Co.* v. *Cleveland,* Advance Sheets, U.S. (1906) 202, to be in the railway company which has been operating the road; and the power of the municipality to confer upon another street railway company the right to take possession of such property is denied.

WATERCOURSE.—The owner of the servient estate is held, in *Pohlman* v. *Chicago, M. & St. P. R. Co.* (Iowa), 6 L.R.A. (N.S.)

146, not to be liable for hastening the flow of surface water therefrom, although it results in the wearing of ditches in the dominant estate.

Where water runs in a well-defined channel, with bed and banks, made by the force of the water, and has a permanent source of supply, it is held, in *Rait* v. *Furrow* (Kan.), 6 L.R.A. (N.S.) 157, that it is to be regarded as a natural water course, although the stream may be small, its course short, and it may have existed for only a short time.

An owner of land bounded by a navigable stream is held, in *Fowler* v. *Wood* (Kan.), 6 L.R.A. (N.S.) 162, to have the right to protect his soil against the inroads of the water, to secure accretions which form against his bank, and to erect and maintain improvements necessary to promote commerce, navigation, fishing, and other uses of the river as navigable water, but to have no right, by obstruction placed across the main current, to deflect the stream itself into a new channel.

One erecting fences and culverts across a stream is held, in *American Locomotive Co.* v. *Hoffman* (Va.), 6 L.R.A. (N.S.) 252, not to be liable for injuries to an upper riparian proprietor because they are not sufficient to pass an extraordinary flood due to the giving way of a dam, or to an unprecedented rainfall.

That the water of a navigable lake cannot be withdrawn below the original low-water mark for irrigation purposes, to the injury of a riparian owner who acquired his rights prior to the adoption of the constitutional provision vesting title to the navigable waters in the State, is declared in *Madson* v. *Spokane Valley L. & W. Co.* (Wash.), 6 L.R.A. (N.S.) 257.

Flotsam and Jetsam.

PRESUMPTIONS AS TO POSSIBILITY OF ISSUE:—The *Law Times* (p. 405) gives a collection of the authorities in the English reports which would be useful to the practitioner desiring to know the trend of the cases on this subject.

A writer in the *Central Law Journal* (U.S.A.) p. 428) collects the authorities in the United States on the power of a Court to compel a plainiff in a suit to submit to a physical examination. As the number of accidents is ever increasing and actions of negligence are multiplying in these days, the subject is one of interest.

Canada Law Journal.

VOL. XLIII. JULY. NOS. 13 AND 14.

FISHERY CONCESSIONS TO THE UNITED STATES IN CANADA AND NEWFOUNDLAND.

Great Britain is the only great modern colonizing power which has, by several treaties with Foreign Nations, conceded to their alien citizens the free privilege of sharing in competition with her own Colonial subjects, the national and productive fishery wealth of the marine belt of territorial coast waters of Canada and Newfoundland, without requiring any financial recompense, or reciprocal privilege. These colonial fisheries are part of the national assets of the local Governments; and if this national asset of fish can be so conceded to alien fishermen, so may their colonial mineral, or timber, assets be conceded, on similar terms, to the alien traders of foreign nations.

These exceptional privileges must be classed as derogations from the universally recognized principle of International Law, which assures to every independent nation the right of territorial inviolability and sovereignty, exclusive, and free of all interference by the alien subjects of other nations. Being exceptional, and in derogation of the territorial sovereignty of the ceding nation, they are classed as Servitudes Voluntariæ, or voluntary national easements to aliens; and are therefore to be construed strictly, both as to property and territorial conditions of user; so that the privilege-ceding nation shall not be held to have conceded to the privileged alien citizens of the other nation more than the strictest construction of the treaty will warrant; for sovereignty over its own national property cannot be impaired upon implication; and also that the concession, or easement, shall not be held to have relieved such privileged alien citizens from their subordination to such public laws, or municipal or police regulations, as bind the home or colonial subjects of the privilege-ceding nation, and which are not ex-

pressly annulled by the treaty and are sanctioned by, or reasonably deducible from, International Law.

The doctrine of International Law defining the construction of treaties of cession between nations, was considered by the Supreme Court of the United States, when Chief Justice Marshall and Mr. Justice Story were among its members; and it was held that even where the expressions used in any such treaty were capable of two constructions, the construction which was most favourable to the ceding nation, should govern; and it was further held that public grants were to be construed strictly, and in favour of the sovereign power, and to be held to convey nothing by implication to the grantee; and that, in all cases, a King's grant should never be construed to deprive him of a greater source of revenue than he intended to grant, nor be deemed to be prejudicial to the Commonwealth.[1] And British law concurs as to home rights, that if the Crown's grant, when reasonably construed, would be injurious to the vested interests of other subjects, the grant should be restrained according to circumstances.[2]

International Law summarises the doctrine thus: "Whenever or in so far as a State does not contract itself out of its fundamental sovereign rights by express language, a treaty must be construed so as to give effect to these rights. Thus, for example no treaty can be taken to restrict, by implication, the rights of sovereignty, or property, or self preservation."[3]

The earliest British treaty-concession in the nature of Servitudes Voluntariæ, will be found in the fishery article (13) of the Treaty of Utrecht of 1713, between Great Britain and France, by which Great Britain "allowed" fishery privileges to French fishermen on certain coasts of Newfoundland, afterwards changed to other coasts by the treaty of 1783.

By the Anglo-French Treaty of 1904, which forms the basis

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[1] *United States* v. *Arredondo*, 7 Peters (U.S.) 691.

[2] *Rex* v. *Butler*, 3 Levinz, 220.

[3] Hall's International Law (5th ed.), p. 339.

of the present entente cordiale between France and Great Britain, France renounced "the privileges established to her advantage by article 13 of the Treaty of Utrecht, and confirmed or modified by subsequent provisions." But Article 2 declares that "France retains for her citizens, on the footing of equality with British subjects, the right of fishing in the territorial waters," along certain described portions of the coast of Newfoundland, subject to the laws and regulations now in force, or which may hereafter be passed, for the establishment of a close time in regard to any particular kind of fish, or for the improvement of the fisheries.[4]

The wording of the second article that "France retains for her citizens, on the footing of equality with British subjects, the right of fishing in the territorial waters" of Newfoundland, would seem to be a diplomatic mis-script of the expression "allowed" in the treaty of 1713.

National and civil rights within a sovereignty are the birthright privileges of its subjects. And as every sovereign may forbid the entrance into his territory either of foreigners in general, or of certain classes of foreigners, he can annex to the permission to enter, whatever conditions he considers to be advantageous to the state: and therefore the permission to enter cannot be construed as conferring upon the admitted foreigners a "right," but only a "liberty" or "privilege." The words "retain the right" used in the treaty must be construed as diplomatically condoning the assertion of a foreign trespass on the sovereign prerogatives and territorial inviolability inherent in national sovereignty.[5]

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[4]The treaty of 1904 provided that the British Government should pay a pecuniary indemnity to the French citizens who had to abandon their establishments, or give up their occupation, in consequence of the modifications introduced by the treaty,—which indemnity amounted to £54,683, or $273,415.

[5]In 1888, France formulated a claim that: "The right of France to the coast of Newfoundland reserved to her fishermen, is only a part of her ancient sovereignty over the island, which she retained in ceding the soil to England, and which she has never weakened or alienated:" Prowse's History of Newfoundland, page 541. But the Treaty of Utrecht—which ceded Newfoundland with the adjacent islands "to belong of right wholly

The second of these Servitudes Voluntariæ was conceded to the United States by the Treaty of Independence of 1783; but as its fishery article was abrogated by the War of 1812; it will only be necessary to quote the construction given to it by Lord Bathurst, the British Foreign Secretary, in a despatch dated 30th October, 1815, addressed to Mr. J.Q. Adams, then American Minister in London; in which, after enforcing the British declaration that the War of 1812 had abrogated the fishery article of the Treaty of 1783, he said: "The undersigned begs to call the attention of the American Minister to the wording of the third article.....In the third article Great Britain acknowledges the right of the United States to take fish on the banks of New foundland, and other places in the Sea, from which Great Britain had no right to exclude any independent nation. But they were to have the liberty to cure and dry fish on certain unsettled places within His Majesty's territory, dependent on the will of British subjects in their character of inhabitants, proprietors, or possessors of the soil, to prohibit its exercise altogether."

Mr. Adams while conceding this latter right, argued that the War of 1812 had not abrogated the fishery article, claiming that, "The treaty was not simply a treaty of peace; it was a treaty of partition between two parts of one nation agreeing thenceforth to be separated into two distinct sovereignties;" and was a partition of "rights and liberties enjoyed before the separation of the two countries;"[6] and which he claimed, "were in no respect grants from the King of Great Britain to the United States," and, therefore, "the Government of the United

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to Britain,"—contained the following renunciation of French sovereignty: "Nor shall the Most Christian King, His Heirs and Successors, or any of their subjects, at any time hereafter, lay claim to any right to the said island or islands, or to any part of it, or them." (Hartslet's Treaties, vol. 1, p. 237.

[6]"The analogy suggested between the treaty of 1783 and a partition among co-owners of their lands, and the rights issuing therefrom, is more fanciful than sound. That treaty created and conferred a liberty, and did not merely recognize a subsisting right to fish in the Canadian territorial waters:" American Law Review, 1870-1, vol. 5, page 421.

States consider the people thereof as fully entitled, of right, to all the liberties in the North American fisheries which have always belonged to them, and which they never have, by any act of theirs, consented to renounce.'[7]

Lord Bathurst's answer was that: "As to the origin of these privileges, the undersigned is ready to admit that so long as the United States constituted a part of the dominions of His Majesty, their inhabitants had the enjoyment of them, as they had of other political and commercial advantages, in common with His Majesty's subjects. But they had, at the same time, in common with His Majesty's other subjects, duties to perform; and when the United States, by their separation from Great Britain, became released from these duties, they became excluded from the advantages of British subjects." And he summarised the Minister's contention thus: "The United States conceive themselves, at the present time, to be entitled to prosecute their fisheries within the limits of the British sovereignty, and to use British colonial territories for the purposes connected with their fisheries;"—"a claim by an independent State to occupy and use, at its discretion, any portion of the territory of another State, without compensation, or some corresponding indulgence.'[8]

And, in stating the colonial experience of how the American fishermen had misused the fishery privileges conceded to them, he added: "It was not of fair competition that His Majesty's Government had reason to complain; but of the pre-occupation of British harbours and creeks in North America by the fishing vessels of the United States; and the forcible expulsion of British vessels from places where their fisheries might be advantageously conducted. They had likewise reason to complain

[7]American State Papers, Foreign Relations, vol. 4, pages 351, 352, 353 and 355. While American writers on International Law still cling to the view that the War of 1812 did not abrogate the fishery article of 1783, President Polk in his message to Congress in 1847, declared that "a state of war abrogated treaties previously existing between the belligerents." Spain in 1898 took the same ground: See Foreign Relations (U.S.), 1898, page 973.

[8]American State Papers, Foreign Relations, vol. 4, pages 354, 356.

of the clandestine introduction of prohibited goods into the British Colonies, by American vessels ostenibly engaged in the fishing trade to the great injury of the British revenue." And in suggesting a "modified renewal" of the fishery privileges, he added: "But Great Britain can only offer the concession in a way which shall effectually protect her own subjects from such obstructions to their lawful enterprises, as they too frequently experienced immediately previous to the late war, and which are, from their very nature, calculated to produce collision and disunion between the two states."

Another contention of the Minister was that fishermen had, by common and universal usage, been "entitled to a more than ordinary share of protection, and that it was usual to spare and exempt them even from the most exasperated conflicts of national hostility." And he objected that the original grant should be ascribed to "the improvident grant of an unrequited privilege, or to a concession extorted from the humiliating compliance of necessity."[9]

Lord Bathurst declined to admit that the claim of the American fishermen to fish within British waters, and to use British territory for purposes connected with their fishery, "was analagous to the indulgence which had been granted to an enemy's subjects engaged in fishing on the high seas."[10]

Lord Stowell, in a judgment delivered by him in 1798, had declared what was the law of Great Britain on this question: "In former wars it had not been usual to make captures of those small fishing vessels. But this rule was a rule of comity only, and not of legal decision. In the present war there has, I presume, been sufficient reason for changing this mode of treatment. They fall under the character and description of ships constantly, and exclusively, employed in the enemy's trade."[11]

[9]Ibid., page 353. Congress had originally made the fisheries one of the points in its ultimatum for peace; but in June, 1781, it directed its Commissioners that "a desire of terminating the war has induced us not to make the acquisition of the North American fisheries an ultimatum on the present occasion:" Secret Journals of Congress, vol. 2, page 228.

[10]American State Papers, Foreign Relations, vol. 4, page 356.

[11]The Young Jacob and Johanna, 1 C. Robinson, 20.

This decision of Lord Stowell's gave legal ground for Lord Bathurst's declaration that "Great Britain knows of no exception to the rule that all treaties are put an end to by a subsequent war between the same powers;" for Lord Stowell, in the case referred to, defined fishing as a "trade," and therefore any exercise during the war, of the special privileges conceded to American fishermen to make "agreements" with British proprietors for places to dry and cure fish, for the repair of damages, and for the purchase of wood, and to obtain water, within the bays and harbours of the British Colonies, would necessarily bring the American fishermen within the prohibition of "trading with the enemy," and make them, and their vessels, liable to the penalties prescribed by the municipal laws of the United States and Great Britain.

And the Supreme Court of the United States also declared that "No principle of international, or municipal, law is better settled than that all contracts and commercial intercourse, between the citizens of hostile states, during a state of hostility, are utterly void; and that this doctrine could not at that date (1833) be questioned, for it had been the acknowledged and settled doctrine of the Supreme Court for nearly twenty years; that shipments made by citizens of the United States from an enemy's country during the war, were subject to condemnation as quasi enemy's property; and that if, after a knowledge of the war, an American vessel should go to an enemy's port and take in a cargo there, the vessel and cargo were liable to confiscation as prize of war, for trading with the enemy."[12] To which may be added the doctrine of the United States that: "Property on an enemy's territorial waters rests, on principle, on the same basis as property on his land."[13]

Lord Castlereagh succeeded Lord Bathurst as Foreign Secretary in 1816, and under his instructions, Mr. Bagot, then

[12] *Scholfield* v. *Eichelberger*, 7 Peters (U.S.) 586; and 3 Condensed Reports of the U.S. Supreme Court, 147.

[13] Wharton's Digest of the International Law of the United States, vol. 3, s. 341.

British Minister at Washington, offered to the United States the coast fisheries "on the Labrador shore between Mount Joli, on the Esquimaux shore, near the Straits of Belle Isle," but these were declined by the United States on the ground that, "it would be more for our advantage to commence at the last mentioned point, and to extend the right eastward through the Strait of Belle Isle as far along the Labrador coast as possible."[14]

Mr. Bagot then offered, as an alternative, "the shore of Newfoundland to commence at Cape Ray, and to extend east to the Rameau Islands," adding that "in estimating the value of the proposal, the American Government will not fail to recollect that it is offered without any equivalent;"[15] an offer intimating an abandonment of the British protocol in the negotiations for the Treaty of Ghent of 1814, that "the privileges formerly granted to the United States of fishing within the limits of British sovereignty, and of landing and drying fish on the shores of the British colonial territories, would not be renewed gratuitiously, or without an equivalent."[16]

Mr. Secretary Munroe's reply sustained the historic policy of the United States: "I have made every inquiry that circumstances permitted respecting both these coasts, and find that neither would afford to the citizens of the United States the essential accommodation which is desired, neither having been much frequented by them heretofore, nor likely to be in future. I am compelled therefore to decline both propositions."[17]

The British Government, submitting to this uncomplaisant rebuff, intimated that it was "willing that the citizens of the United States should have the full benefit of both of them, and that, under the conditions already stated, they should be also admitted to each of the shores."

But Mr. Secretary Munroe's appetite for Canadian fish being still unsatisfied, he "asked for more:" "Having stated in

[14]American State Papers, Foreign Relations, vol. 4, page 361.

[15]Ibid., page 365.

[16]American State Papers, Foreign Relations, vol. 3, pages 705 and 708.

[17]Ibid., vol. 4, page 361.

my former letter that according to the best information which I have been able to obtain, neither of those coasts have been much frequented by our fishermen, or were likely to be so in future; I am led to believe that they would not, when taken conjointly, as proposed in your last letter, afford the accommodation which is so important to them." And he thereupon added the hope that "an arrangement on a scale more accommodating to the expectations of the United States, would not be inconsistent with the interests of Great Britain."[18]

Ultimately Great Britain, not forecasting the future, and presumably influenced by the persistently aggressive attitude of the United States, agreed that American fishermen should have the right to share in the local fishery asset of its colonial subjects in their territorial coast-waters without any financial compensation, or reciprocal equivalent; and the American Plenpotentiaries had the satisfaction of reporting to their Government the fullest extension of the free fishing area desired by their instructions. "We have succeeded in securing, besides the right of taking and curing fish within the limits designated by our instructions, as a sine qua non, the liberty of fishing on the coasts of the Magdalen Islands, and on the western coast of Newfoundland, and the privilege of entering for shelter, wood and water in all the British harbours of North America."[19] These gratuitous concessions of valuable colonial fisheries to the alien-citizens of another nation may test whether as asserted by a British authority: "Great Britain has never been remiss in maintaining the rights of the fisheries."[20]

The first article of the treaty, and the third Servitudes Voluntariæ, apparently ignoring Lord Bathurst's declaration that the fishery article in the Treaty of 1783, had been abrogated by the War of 1812, and supporting the contention of the United States that "the fisheries secured by us were not a new grant," provided:

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[18]Ibid., page 366.

[19]Ibid., page 380.

[20]Phillimore's International Law (3rd ed.), vol. 1, page 270.

"Whereas differences having arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, and creeks of His Britannic Majesty's dominions in America, it is agreed between the High Contracting Parties that the inhabitants of the said United States shall have, forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Rameau Islands; on the western and northern coast of Newfoundland from the said Cape Ray to the Quirpon Islands; on the shores of the Magdalen Islands; and also on the coasts, bays, harbours and creeks, from Mount Joli, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company. And that the American fishermen shall also have the liberty forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks, on the southern part of the Coast of Newfoundland hereabove described;[1] and of the coast of Labrador; but, so soon as the same or any portion thereof shall be settled, it shall not be lawful for the said fishermen to dry, or cure, fish at such portions so settled, without previous agreement for such purpose with the inhabitants, proprietors or possessors of the ground. And the United States hereby renounce, forever, any liberty, heretofore enjoyed, or claimed, by the inhabitants thereof, to take, dry, or cure, fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America, not included within the above mentioned limits.[2]

"Provided, however, that the American fishermen shall be at liberty to enter such bays, or harbours, for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such Restrictions as may be necessary

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[1]By the treaty of 1783, American fishermen had been expressly prohibited from drying or curing fish on the coasts of Newfoundland.

[2]This renunciation excludes American fishermen from fishing within the three marine mile belt of territorial waters along the eastern and south-eastern coasts of Newfoundland and along the coasts of Nova Scotia, New Brunswick, Prince Edward Island, Quebec, west of Mount Joli, and also British Columbia; subject to the treaty proviso as to shelter, repairing damages, and obtaining wood and water, within their bays and harbours.

to prevent their taking, drying, or curing, fish therein, or, in any other manner whatever abusing the privileges hereby reserved to them."

The British Act of 1819, 59 Geo. III. chapter 38, giving effect to the treaty, authorized the Crown "to make such Regulations, and to give such Directions, Orders and Instructions to the Governor of Newfoundland, or to any officer or officers on that station, or to any other person or persons whomsoever, as shall or may be deemed proper and necessary for the carrying into effect the purposes of the said Convention, with relation to the taking, drying, or curing, of fish by the inhabitants of the United States of America, in common with the British subjects within the limits set forth in the said Article of the said Convention hereinbefore recited."

Another section provided that such Restrictions or Regulations as may be necessary to prevent American fishermen from taking, drying, or curing, fish in the renounced bays and harbours; or, in any other manner whatever, abusing the said privileges conceded to them by the said Treaty, and the Act, should be made by Order-in-Council, or by the Governor of such parts of His Majesty's dominions. And the last section provided that any person, or persons, refusing to depart from such bays, or harbours, or refusing or neglecting to conform to any such Regulations or Directions, were to be liable to a penalty of £200.

By the latter proviso of the Fishery Article, the United States expressly acknowledged the sovereignty of Great Britain in the words that American fishermen "shall be under such Restrictions as may be necessary" to regulate the concession, and to prevent the abuse, of the fishery privileges conceded to them within the British territorial coast-waters described in the Article. And the British Act, as the exercise of that sovereignty, authorized the Crown, by Order-in-Council, to prescribe, or to vest authority in Newfoundland to prescribe, such Restrictions or Regulations as should be deemed proper and necessary for carrying into effect the purposes of the treaty; which authority

was subsequently vested in Newfoundland by the grant from the Crown of a Constitution conferring upon the British subjects within the Colony, legislative and executive powers of Government.

The Reciprocity Treaty of 1854, and the Washington Treaty of 1871, conceded further fishery privileges to American fishermen within the territorial coast-waters of Canada and Newfoundland, with reciprocal fishery privileges to British colonial fishermen within the territorial coast-waters of the United States on the Atlantic coast; but as the former treaty was terminated by the United States in 1866, and as the fishery articles in the latter were revoked by the United States in 1885, it will only be necessary to refer to the diplomatic discussions between the two Governments respecting their provisions.

Owing to the diplomatic controversy over the Fortune Bay disturbances of 1878, the British Government appointed Captain Sulivan, R.N., senior naval officer at Newfoundland, to investigate the facts of the disturbances; and his report was furnished to the Government of the United States with the following observations by Lord Salisbury:

"You will perceive that the report in question appears to demonstrate conclusively that the United States fishermen on this occasion, had committed three distinct breaches of the law; and that no violence was used by the Newfoundland fishermen, except in the case of a vessel whose master refused to comply with the request which was made to him that he should desist from fishing on Sunday, in violation of the law of the colony, and of the local custom, and who threatened the Newfoundland fisherman with a revolver."[23]

The three distinct breaches of law, so found by the investigating British Naval Officer were: (1) Fishing on Sunday—forbidden by an Act of 1876. (2) Fishing during the close season for fish—forbidden by an Act of 1862; (3) Fishing by seines—forbidden by an Act of 1862. The Naval Officer fur-

[23]Foreign Relations (U.S.), 1878-9, page 284.

ther reported that, contrary to the terms of the treaty, the American fishermen were fishing illegally, interfering with the rights of British fishermen and their peaceful use of that part of the coast then occupied by them, and of which they were in actual possession by their seines and boats, their huts and gardens and lands granted by Government."[24]

This report of the illegal proceedings of American fishermen under the Treaty of 1815, and Lord Bathurst's statement of the colonial experience of Canada and Newfoundland under the Treaty of 1783, shew how the concessions of free fishery privileges in the colonial territorial coast-waters under both treaties, had been aggressively abused by American fishermen.

Mr. Secretary Evarts, in discussing these Fortune Bay disturbances, maintained the "broad doctrine" that no British authority had a right to pass any kind of laws binding on American fishermen while fishing in British waters, saying: "If our fishing fleet is subject to the Sunday laws of Newfoundland, made for the coast population; if it is excluded from the fishing grounds from October to April (by the close season law), if our seines and other contrivances for catching fish are subject to the Regulations of the Legislature of Newfoundland, it is not easy to see what firm or valuable measure for the privilege of Article 18 of the Treaty of 1871, as conceded to the United States, this Government can promise to its citizens under the guaranty of the treaty." And as a corollary he claimed: "If there are to be Regulations of a common enjoyment, they must be authenticated by a common or joint authority;"[25] a doctrine of joint sovereignty over British territorial waters and coasts, which must have given a startling surprise to both British and International Law.

And Mr. Evarts further argued: "Manifestly the subject of the Regulation of the enjoyment of the in-shore fishery by the resident Provincial population, and of the in-shore fishery by our fleet of fishing cruisers, does not tolerate the control of

[24]Ibid., page 285.

[25]Ibid., page 310.

so divergent, and competing, interest by the domestic legislation of the Provinces. Protecting and nursing the domestic interest, at the expence of the foreign interest, on the ordinary motives of human conduct, necessarily shape and animate the local legislation." And he asked from Her Majesty's Government "a frank avowal, or disavowal, of the paramount authority of Provincial legislation to regulate the enjoyment by our people of the in-shore fishery."[26]

Lord Salisbury's reply was that if Mr. Evarts' contention that no British Authority has a right to pass any kind of laws binding on Americans while fishing in British waters, be just, the same disability would apply a fortiori to any other power; and "the treaty waters must be delivered over to anarchy."[27] He subsequently shewed that the Newfoundland regulations, then complained of, were in force at the date of the Treaty of Washington, and were not abolished, but were confirmed by subsequent statutes, and were therefore "binding under the Treaty upon the citizens of the United States, in common with British subjects." And he added that "Her Majesty's Government feel bound to point to the fact that the United States fishermen were the first and real cause of the mischief by overstepping the limits of the privileges secured to them, in a manner gravely prejudicial to the rights of the British fishermen," and he closed by refusing on behalf of the British Government, to acknowledge any liability for the claims of the American fishermen.[28]

Hall's International Law, commenting on this Fortune Bay incident, says: "It was argued by the United States that the fishery rights conceded by the treaty were absolute, and were to be 'exercised wholly free from the regulations of the Statutes of Newfoundland, set up as an authority over our fishermen, and from any other Regulations of fishing now in force, or that may hereafter be enacted by that Government.' In other

[26]Ibid., pages 310-11.

[27]Ibid., page 323.

[28]Ibid, 1880-1, page 572.

words, it was contended that the simple grant to foreign subjects of a right to enjoy certain national property, in common with subjects of the State, carried with it, by implication, an entire surrender, in so far as such national property was concerned, of one of the highest rights of sovereignty, viz.: the right of legislation. That the American Government should have put forward such a claim is scarcely intelligible."[29]

The damages claimed by the United States Government amounted to $105,305. But the succeeding Government, through Lord Granville, while insisting that the Treaty of 1871 meant that "the American and British fishermen shall fish in the Newfoundland waters within the limits of British sovereignty upon terms of equality, and not that there shall be an exemption of American fishermen from any reasonable regulations to which British fishermen are subject,"[30] and rejecting claims for fish caught "by means of strand fishing, a mode of fishing to which under the Treaty of Washington, they were not entitled to resort," agreed, contrary to Lord Salisbury's decision, to pay $75,000 to the United States in June 1881.

And while willing to confer respecting Regulations for the reciprocal fishery privileges of each nation in the territorial coast-waters of either country, under the then existing Treaty of Washington, Lord Granville expressly indicated the legislative authority to prescribe such Regulations: "The duty of enacting and enforcing such Regulations when agreed upon, would, of course, rest with the Power having the sovereignty of the shore and waters in each case."

But in the present diplomatic complaints against the fishery regulations of Newfoundland, Mr. Secretary Root, in his despatch dated the 19th October, 1905, to the British Minister at Washington, revives Mr. Evart's contentions against the subordination of American fishermen to the laws of Great Britain or Newfoundland, and which contentions were negatived by the British Government in 1863, 1878, 1880, 1886 and 1887.

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[29] Ed., page 340.

[30] Foreign Relations (U.S.), 1880-1, page 589.

Mr. Secretary Root makes the admission that there are two classes of American vessels (1) "vessels which are registered and (2) vessels which are licensed to fish and not registered." "The vessels with a license can fish but cannot trade; the registered vessels can lawfully both fish and trade;" which latter class includes the whole mercantile marine of the United States. And he claims that: "Any American vessel is entitled to go into the waters of the treaty coast and take fish of any kind." "She derives this right from the treaty, and not from any permission or authority proceeding from the Government of Newfoundland."[31]

A Foreign Office Memorandum published by the Imperial Parliament in 1906, affectively answers this contention by shewing that Mr. Root misquotes the treaty: "The privilege of fishing, conceded by Article 1, of the Convention of 1818, is conceded—not to American vessels, but—to the 'inhabitants of the United States' and to 'American fishermen.' His Majesty's Government are unable to agree to this contention or any of the subsequent propositions, if they are meant to assert any right of American vessels to prosecute the fishery under the Convention of 1818, except when the fishery is carried on by the inhabitants of the United States. The Convention confers no right on American vessels as such."[32]

As supplementary to the answer given above, it may be added that the treaty, by the use of the expression "American fishermen," and of the trade-work terms "take, dry, and cure, fish," has designated the special trade-class of the privileged "inhabitants of the United States," and their special marine class of vessels employed therefor, and to whom the treaty privileges of fishing in the British territorial coast-waters of Canada and Newfoundland, and of using their unsettled coasts for the trade-work purposes of drying and curing their fish, are conceded; and assuming that the maxim expressio unius est exclusio alterius, and that the doctrine as to strict treaty-cession

[31]Correspondence respecting the Newfoundland Fisheries, 1906, page 2.
[32]Ibid., page 6.

construction, apply, it would follow that the treaty privileges are conceded only to those American vessels whose crews are American fishermen, and experts in the trade-business of fishing, and in the trade-work of drying and curing fish.

Another contention of the Secretary is that "When a vessel had produced papers shewing that she is an American vessel, the officials of Newfoundland have no concern with the character or extent of the privileges accorded to such vessel by the Government of the United States. No question, as between a registry and a license, is a proper subject for their consideration. They are not charged with enforcing any laws or regulations of the United States. As to them if the vessel is American, she has the treaty right, and they are not at liberty to deny it."[33]

This contention is also fully answered by the Foreign Office Memorandum, which—in entire harmony with the previous decisions of Lord Salisbury in 1878, 1880 and 1881. Lord Granville, in 1880, Lord Rosebery and Lord Iddesleigh in 1886,—says:[34] "In the opinion of His Majesty's Government, American fishermen are bound to comply with all Colonial Laws and Regulations, including any touching the conduct of the Fishery, so long as these are not in their nature unreasonable, and are applicable to all fishermen alike."[35]

The Foreign Office Memorandum is sustained by the following opinion given by the Law Officers of the Crown, Sir W. Atherton and Sir Roundell Palmer, on the 6th January, 1863, on the fishery clauses in the Treaties of 1818 and 1854:

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[33]An American law writer says: "There seem to be special reasons why the Dominion authorities may inhibit general commerce by Americans engaged in fishing. Their vessels clear for no particular port; they are accustomed to enter one bay or harbour after another as their needs demand, they might thus carry on a coasting trade; they would certainly have every opportunity for successful smuggling. Indeed this whole subject legitimately belongs to a local customs and revenue system, and not to the fisheries." American Law Review, 1870-1, vol. 5, page 414.

[34]Foreign Relations (U.S.), 1878-9, pages 284 and 323; 1880-1, pages 572 and 589; 1886, page 398; 1887, pages 447 and 469.

[35]Correspondence, page 7.

"That in our opinion, the inhabitants of the United States fishing within waters in the territorial jurisdiction of the Legislature of Newfoundland, or of any other of the British Colonies, are bound to obey, and are legally punishable for disregarding, the laws and regulations of the fisheries enacted by or under the authority of the respective Provincial Legislatures. The plain object of the treaties was to put the inhabitants of the United States as regards the 'liberty to take fish' within the parts of the British Dominions described, on the same footing as 'subjects of His Britannic Majesty,' 'in common with' whom, under the terms of the treaty, such liberty was to be enjoyed. The enactments subsequently passed did but confirm the treaties, and provide for the suspension, during the operation of those treaties, of such laws, etc., as were or would be inconsistent with the terms and spirit of the treaties, which 'terms and spirit' are, it appears to us, in no respect violated by the Regulations bona fide made for the government of those engaged in the fishery, and equally applicable to British subjects so employed."

This opinion was sent by the Colonial Secretary to the Governor of Newfoundland in a despatch dated the 2nd Febrary, 1863, in which he said: I have only to add my desire that, while asserting the authority of Colonial Law in colonial waters within the limits of existing treaties, you will take care to do so in the manner which is likely to be least offensive to the foreigners who may fall within its scope." And in a despatch dated the 3rd August, 1863, in commenting on a Draft Colonial Bill for regulating the fisheries of Newfoundland, he said: "I apprehend that it is not your expectation that I should express an opinion respecting the practical modes of conducting these fisheries; it being plain that the inhabitants of Newfoundland are, or ought to be, best capable of judging what regulations are calculated to increase the productiveness of their own seas. And with respect to Imperial interests, I do not think it desirable to anticipate that close inquiry to which any Act passed upon this matter must be subjected to in order to ascertain that it does not

infringe upon the right guaranteed to foreigners, or run counter to any principle of Imperial policy."[36]

But Mr. Secretary Root further contends that: "The Government fails to find in the treaty any grant of right to the makers of colonial law, to interfere at all, whether reasonably, or unreasonably, with the exercise of the American rights of fishery, or any right to determine what would be a reasonable interference with the exercise of that American right." "The treaty of 1818 either declared or granted, a perpetpal right to the inhabitants of the United States, which is beyond the sovereign power of England to destroy, or change. It is considered that this right is, and forever must be, superior to any inconsistent exercise of sovereignty within the territory." "This Government cannot permit the exercise of these rights to be subject to the will of the Colony of Newfoundland. The Government of the United States cannot recognize the authority of Great Britain to determine whether American citizens shall fish on Sunday." And he adds: "An appeal to the general jurisdiction of Great Britain over the territory is, therefore, a complete begging the question."[37] Surely Lord Salisbury was justified in saying that "if such contentions were just, the Newfoundland territorial waters must be delivered over to anarchy."

As negativing the diplomatic contentions of Secretaries Evarts and Root, may be cited the instructions given by Mr. Secretary Marcy in 1856, for the guidance of American fishermen under the extended fishery privileges conceded to them by the Reciprocity Treaty of 1854: "It is understood that there are certain Acts of the British North American Colonial Legislatures, and also, perhaps, Executive Regulations, intended to prevent the wanton destruction of the fish which frequent the coasts of the colonies, and injuries to the fishing therein. It is deemed reasonable and desirable that both the United States and

[36]U.S. Ex. Doc., No. 84 (1880), page 110; and U.S. Ex. Doc. No. 113 (1888), page 251. The Law Officers' opinion was also published, in the Newfoundland Legislative proceedings, 1863-4.

[37]Correspondence, pages 12, 13, and 14.

British fishermen should pay a like respect to such laws and regulations, which are designed to preserve and increase the productiveness of the fisheries on these coasts. Such being the object of these laws and regulations, the observance of them is enforced upon the citizens of the United States, in the like manner as they are observed by British subjects." And as to reciprocal fishery privileges in the respective British and United States territorial coast waters, he added: "By granting the mutual use of their in-shore fisheries, neither party has yielded its rights to civic jurisdiction over a marine league along its coasts. Its laws are as obligatory upon the citizens or subjects of the other, as upon its own."[38]

And in 1870, after the Government of the United States had been notified that "the Canadian Government with the concurrence of Her Majesty's Ministers, had determined to increase the stringency of the existing practice of dispensing with warnings hitherto given" to American fishermen; and after the Parliament of Canada had passed the Foreign Fishing Acts of 1868 and 1870, authorizing certain Imperial and Colonial officers to go on board any foreign vessel within any Canadian harbour, or hovering in British waters, and examine the master on oath, etc., Mr. Secretary Boutwell, of the Treasury, issued a circular instructing his officers to notify all masters of American fishing vessels of the provisions of the Canadian Statutes.[39] And on the 9th June, he issued another circular advising that "fishermen of the United States are bound to respect the British laws for the regulation and preservation of the fisheries to the same extent to which they are applicable to British and Canadian fishermen."

These instructions are supported by the just position taken by Mr. Secretary Bayard in 1886, during the embittered diplomatic discussions consequent upon the seizure of American vessels after the abrogation by the United States in 1885, of the fishery articles in the Washington Treaty of 1871, in which,

[38]Foreign Relations (U.S.), 1880-1, page 572.

[39]Ibid., 1870, page 411.

after disclaiming "any desire to shield any American vessel from the consequences of a violation of international obligations," he assured the British Government that:: "Everything will be done by the United States to cause their citizens, engaged in fishing, to conform to the obligations of the treaty (of 1818) and to prevent an infraction of the fishery laws of the British Provinces."[40] And he also warned a complainant that "it is the duty and manifest interest of all American citizens entering Canadian jurisdiction to ascertain and obey the laws and regulations there in force."[41] And these executive instructions furnish a complete and effective answer to Mr. Secretary Root's novel contentions.

A learned American law writer, while advocating the claims of the United States, has also admitted that: "The provision of the Canadian Statute[42] than an officer may board an American vessel as soon as she comes into a bay, or harbour, and may remain during her stay therein, is plainly reasonable and proper; it would only be a 'restriction necessary' to prevent the crew taking, curing or drying fish in the territorial waters 'or from in any other manner abusing the privileges reserved to them.' To this extent the Canadian Parliament had a right to go. The claim to lie at anchor in the bays and harbours, and other territorial waters, for the purpose of cleaning and packing fish, or to procure bait therein, by purchase or barter, or to prepare to fish while therein, or to land and tranship cargoes of fish; all of these acts are plainly unlawful, and would be good grounds for the confiscation of the offending vessel, or the infliction of pecuniary penalties."

"Where, from considerations of public policy, statutes are made to declare some final result illegal, the legislature uniformly forbids the preliminary steps which are directly connected with that result and lead up to it, and facilitate its accomplishment."[43]

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[40]Ibid., 1886, page 377.

[41]The Fisheries Question, U.S. Ex. Doc., 1887-8, vol. 9, page 467.

[42]Revised Statutes of Canada (1886), c. 93; now (1906), c. 47.

[43]American Law Review, 1870-1, vol. 5, pages 408 and 410.

The true doctrine on this question is fairly stated in Phillimore's International Law: "With respect to merchant and private vessels, the general rule of law is that, except under the provisions of an express stipulation, such vessels have no exemption from the territorial jurisdiction of the harbour or port, or, so to speak, territorial waters (mer litorale) in which they lie."[44] And he supports this by citing the doctrine so clearly expounded by Chief Justice Marshall in the following judgment: "When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other; or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continued infraction, and the Government to degradation, if such individuals or merchants, did not owe temporary and local allegiance, and were not amenable, to the jurisdiction of the country. Nor can any foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him; nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption." "One sovereign being in no respect amenable to another, is bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself, or its sovereign territorial rights, within the jurisdiction of another."[45]

British law is to the same effect. In the Franconia case, the judges generally concurred with Mr. Justice Lindley, when he said: "It is conceded that even in time of peace, the territoriality of a foreign merchant-ship within three miles of the coast of any state, does not exempt that ship, or its crew, from

[44]Vol. 1, page 483.

[45]*Schooner Exchange* v. *McFadden*, 7 Cranch (U.S.) 144.

the operation of those laws which relate to its revenues, or fisheries.'"[46] And Sir Travers Twiss tersely states that "Treaty engagements in such matters (fisheries in common) do not give any other right than that which is expressed in the specific terms."[47]

The ancient Anglo-Danish Treaty of 1670-1 (renewed after the War of 1814) early affirmed the doctrine of the subordination of foreign subjects to local laws, while availing themselves of the reciprocal privileges of fishing and trading within the territory of the other sovereign. It provided that the people and subjects of either sovereign "as well in going, returning and staying, as also in fishing and trading," should enjoy the same liberties, immunities, and privileges, which the people of any foreign nation whatsoever, abiding and trading thither, do or shall enjoy. "But so that the sovereign power of both Kings in their Kingdoms and ports, respectively to appoint and change customs, or any other matters, according to occasion, be preserved, and remain inviolate."[48] And by an Anglo-French Treaty of 1814, French subjects were permitted "to continue their residence and commerce in India, so long as they shall conduct themselves peaceable, and shall do nothing contrary to the laws and regulations of the Government."[49]

Another view may also be suggested. The treaty, by granting to American fishermen the liberty of fishing in the Canada and Newfoundland territorial coast-waters, "in common with the subjects of His Britannic Majesty"—which subjects had a national title to the fishery within the marine belt of their territorial coast-waters—granted that which had some incidents of a tenacy-in-common; and therefore both such tenants-in-common,—subjects and aliens,—deriving their "common" titles from the same sovereignty, must logically be held to take and

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[46] *Regina* v. *Keyn*, 2 Exch. Div. 93.

[47] Twiss on the Law of Nations in Time of Peace, page 265.

[48] Hertslet's Treaties, vol. 1, page 181.

[49] Ibid., page 271.

enjoy them subject to the laws of the sovereignty, within which such tenancy-in-common had been granted.

The Anglo-American Treaties of 1854 and 1871, and the signed, though unratified, Treaties of 1874 and 1888, furnish another effective argument. None of them required the assent of any of the State Legislatures of the United States; while in each of them there is an acknowledgement by the United States that the British Colonies had a co-ordinate legislative sovereignty with Great Britain in assenting to the fishery articles, in the words that the fishery articles "shall take effect so soon as the laws to carry them into operation shall have been passed by the Imperial Parliament of Great Britain, by the Parliament of Canada, and by the Legislature of Newfoundland."

But these Anglo-American treaties are also unchallengable authorities supporting the Foreign Office Memorandum of 1906, for they conceded to colonial fishermen the reciprocal privilege of free fishing in certain "bays, harbours, and creeks, on the sea-coasts and shores of the United States, and of its said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States, and of the islands aforesaid, for the purpose of drying their nets, and curing their fish." If the recent diplomatic repudiation of the obligatory force of British and colonial laws on American fishermen within British territorial coast-waters, as formulated by Secretaries Evarts and Root, is part of the Law of Nations, then it logically follows that, while such reciprocal fishery privileges were in force, colonial fishermen, exercising their treaty-privileges of fishing within the marine belt of territorial coast-waters of the several States of the Union, along the Atlantic, and of landing on the State coasts for their trade purposes, were not subject to any of the Federal or State Fishery Laws. And the Government of Great Britain might have similarly contended that it could not recognize the authority of the United States to determine under what laws, or on what days, Canadian fishermen could fish; nor permit their treaty fishery rights, in the territorial

coast-waters of the several States, to be "subject to the authority or will" of the United States or of any of the States of the Union, or "to be interfered with at all, whether reasonably or unreasonably."

And if the argument of "long-continued acquiescence," so strenuously claimed against Great Britain by the United States in the Alaska boundary case, and sustained by the American jurists on that tribunal, is a doctrine of International Law affecting national sovereignties, it must be held to be more forceful when claimed against the United States in these fishery disputes. In the Alaska case "the long-continued acquiescence of Great Britain" consisted chiefly of boundary lines on maps, published by subjects, and some officials, not representatives of the British Government in its relations with foreign powers. In these fishery cases, however, "the long-continued acquiescence of the United States" is evidenced by the executive actions of its Government, in agreeing to a succession of treaties conceding fishery privileges to American fishermen within the territorial coast-waters of Canada and Newfoundland, from 1818 to the signed, but Senate-unratified, Treaty of 1888,—the later ones recognizing the Colonial Sovereignty of legislative ratification,—and to the modus vivendi of 1888, operative in Newfoundland until lately, and still operative in Canada.[50] The fishery laws of Newfoundland, now objected to, had been passed prior to the Washington Treaty, as stated by Lord Salisbury; and as there is nothing in any of the protocols, or treaties, nor in the modus vivendi of 1888, objecting to the now impeached fishery laws, it is therefore reasonable to claim that by the legislative ratification clauses in these treaties, and the modus vivendi, and the official admissions of Secretaries Marcy, Bayard and Boutwell, quoted above, there has been "a long continued acquiescence" by the United

[50]The modus vivendi provides in clause 4: "Forfeiture to be exacted only for the offences of fishing, or preparing to fish, in territorial waters," which imports into the modus vivendi the statutory penalties for such offences. See Statutes of Canada, 1888, 51 Vict. c. 30. The previous Canadian Fishing Acts are recited in 31 Vict. c. 60, s. 20.

States in those colonial fishery laws; and that they are therefore binding on American fishermen, as they are on British fishermen, when fishing within such territorial coast-waters, even should "one of the highest rights of sovereignty, viz., the right of legislation," over such waters be further arraigned under any possible doctrine of International Law.

It is regrettable that Mr. Secretary Root, should have violated international comity when he urged Great Britain to discipline one of her sovereign self-governing colonies, and to control colonial ministerial responsibility to its legislature—using the following language: "I feel bound to urge that the Government of Great Britain shall advise the Government of Newfoundland that the provisions of the law, which I have quoted, are inconsistent with the rights of the United States under the Treaty of 1818, and ought to be repealed. And, that, in the meantime, and without any unavoidable delay, the Governor-in-Council shall be requested, by a proclamation which he is authorized to issue under the Act respecting Foreign Fishing vessels, to suspend the operation of the Act."[51]

Lord Clarendon once commented in the House of Lords on "the extraordinary tone of the President's message, and the apparently studied neglect of that courtesy and deferential language which the Governments of different countries are wont to observe when publicly treating of international questions;" adding, "that if the British Government accordingly did negotiate it would seem that it could only be upon the basis that England was unconditionally to surrender her pretentions to whatever might be claimed by the United States."[52]

The Secretary apparently has not studied the home-rule system of Responsible Government conceded to the self-governing colonies of the British Crown, or he would not have thus urged an unconstitutional interference with that home-rule government, and the resulting Parliamentary responsibility of

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[51]Foreign Relations (U.S.), 1905, page 493; Correspondence, page 4.

[52]Hansard (3rd series), page 117.

the Colonial Ministers of the Crown, to the Legislature of Newfoundland. The Constitution it enjoys confers legislative power on the Governor, by and with the advice and consent of the Legislative Council and Assembly, to "make laws for the public peace, welfare and good government of the said Colony." And under similar grants of legislative powers to Canada, and its several provinces, the Judicial Committee of the Privy Council, as the final Court of Appeal, has held that these legislatures "are not in any sense, the agents, or delegates of the Imperial Parliament, but have, and were intended to have, plenary powers of legislation as large, and of the same nature as those of the Imperial Parliament itself."[53] They have therefore, the powers and attributes of national sovereignty in determining for what causes, or wrongful acts, life, liberty, or property, shall be forfeited, and what civil and political rights shall be enjoyed, by the British subjects within the Colony; and what wrongs shall be prohibited and punished;[54] subject to the limitations that their Legislative Acts shall not be repugnant to any Imperial Act extending to the Colony,[55] or to Imperial policy affecting foreign nations.

Finally, the treaty privileges to American Fishermen to purchase certain supplies in colonial bays and harbours, contains express restrictions—the negative words "and for no other purpose whatever," make imperative[56] the treaty prohibition against all other purchasing or trading; and therefore the purchase of "bait," and whatever is lawfully within the treaty pro-

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[53]*Russell* v. *Regina*, 7 Appeal Cases 829, *Hodge* v. *Regina*, 9 Appeal Cases 117.

[54]Mr. Justice Story thus defined the political status of the British Colonies: "The Colonial Legislatures, with the restrictions necessarily arising from their dependency on Great Britain, were sovereign within the limits of their respective territories; possessing the general powers of government and rights of sovereignty, subject to the realm of England, but still exercising within their own territorial limits the general powers of legislation and taxation."

[55]7th and 8th William III. c. 22, s. 9; 6 George IV. c. 114, s. 49; 28th and 29th Victoria c. 63 (Imp.).

[56]*Rex* v. *Justices of Leicester*, 7 Barn. & Cress. 12.

hibition, is within the legislative discretion of Canada and Newfoundland to prohibit. This view of the Colonial legislative power was urged by the counsel for the United States before the Halifax Fisheries Commission in 1877.

There are English statutory precedents prohibiting British subjects selling fish to strangers (foreigners), and using certain nets in fishing, which may sustain the colonial legislative right to enact certain prohibitory laws regulating fishery rights within their territories.[87]

Shortly after the Foreign Office Memorandum had been communicated to the United States, Lord Elgin—apparently waiving it as an authoritative exposition of Imperial policy, and the Foreign Office decisions on similar contentions by Lords Salisbury, Granville, Rosebery, and Iddesleigh, thereby breaking the "continuity of British foreign policy."—intimated to the Government of Newfoundland that His Majesty's Government were of opinion "that any attempt on the part of the Colonial Government to apply to the American fishermen the Regulations to which exception was taken by the United States, while the discussion was proceeding, might give rise to a highly undesirable and even dangerous situation;" and that "If Ministers should press for the prohibition both of seines and of Sunday fishing, some concessions other than exemption from light dues and customs laws will be expected." And he intimated that the Government were informing the United States Government that they were prepared pending the discussion to negotiate a "provisional arrangement."

The Ministers of Newfoundland replied that they deprecated "any provisional arrangement that would relieve American citizens from a proper recognition of the Statute laws;" and they submitted that the interests of the Empire, and not those of the colony alone, required that the rightful sovereignty within its own dominions, should remain inviolate; and that the yielding to the claims set up, would be a "virtual surrender

[87] 31 Edward III. Stat. 2; 2 Henry VI. c. 15, and others.

of sovereignty within certain territorial waters within the colony to a foreign power.

To this the Colonial Secretary replied that the decision of the Ministers had caused "much disappointment;" and that they had "failed to appreciate the serious difficulty in which their policy had placed both them and His Majesty's Government;" and he wished "to warn Ministers that some further concessions may be necessary if a modus vivendi is to be arranged."[58]

Subsequently a modus vivendi was agreed to between the British and American Governments; and against it the Colonial Ministers again protested as follows: "They have learned with profound regret that His Majesty's Government has, without reference to this colony, proposed to the United States Ambassador, as one of the terms of a modus vivendi, the suspension of the Foreign Vessels Fishing Act of this year;" and that "they had hoped and expected that, before a modus vivendi was proposed to the United States Government the full text of the same would have been submitted to this Government, and thus have afforded them an opportunity for suggestion, or remonstrance."[59]

During the diplomatic correspondence respecting the fishing disputes of 1886, consequent upon the action of the United States in denouncing the reciprocal fishery articles of the Treaty of 1871, the United States Government proposed a modus vivendi on substantially similar terms, that in the meantime Her Majesty's Government should "instruct the proper Colonial and other British officers to abstain from seizing or molesting fishery vessels of the United States," unless they were found fishing in the then non-treaty waters. Lord Salisbury replied that, "this would suspend the operation of the statutes of Great Britain and of Canada, and of the Provinces now constituting Canada, not only as to the various offences connected with fishing, but as to

[58]Correspondence, pages 20-28.

[59]Correspondence, page 31.

customs, harbours, and shipping; and would give to the fishing vessels of the United States privileges, in Canadian ports, which are not enjoyed by vessels of any other class, or of any other nation; and would give greater privileges than are enjoyed at the present time by any vessels in any part of the world;" and he concluded by saying that the proposals were "quite inadmissible;" even though the American Government had proposed, as an article in the modus vivendi, that "the United States agrees to admonish its fishermen to comply with the Canadian customs Regulations, and to co-operate in securing their enforcements; and that obedience by American fishing vessels to Canadian laws, was believed and intended to be secured by this article."[60]

And when the United States subsequently proposed in 1886 "That some ad interim construction of the terms of the existing treaty should, if possible, be reached," Lord Iddesleigh then Foreign Secretary, expressed his disappointment at the proposal "That Her Majesty's Government, in order to allay the differences which have arisen, should temporarily abandon the exercise of the treaty rights which they claim, and which they conceive to be indisputable. Her Majesty's Government are unable to perceive any ambiguity in the terms of article 1 of the Convention of 1818." And he added that whilst Her Majesty's Government were determined to uphold the rights of Her Majesty's North American subjects, they were no less anxious to maintain in their full integrity the facilities for fishing granted to the citizens of the United States.[61]

A modus vivendi cannot operate to dispense with, or suspend, or otherwise render inoperative, or unforcible, any statute law of the Empire or of any Colony; for, as Lord Chancellor Cairns has held, that a Colonial Act is "an Act which is assented to on the part of the Crown, and to which the Crown therefore is a party."[62] And it is trite knowledge that the Bill

[60]Foreign Relations (U.S.), 1887, pages 484 and 487.

[61]Ibid., page 447.

[62]*Theberge* v. *Landry*, 2 App. Cases, page 108. "A legal and confirmed Act of a Colonial Assembly has the same operation and force in the colony,

of Rights declares that "the pretended power of suspending of laws, or the execution of laws, by regal authority, without the consent of Parliament, is illegal."

A different Colonial Policy influenced the Imperial Government when the Anglo-French Treaty of 1857, respecting the Newfoundland Fisheries was submitted to the Legislature of Newfoundland, containing the following regal pledge to France:— "Her Britannic Majesty hereby engaging to use her best endeavours to procure the passing of such laws by the Legislature of Newfoundland as are required to carry it into effect." The Legislature declined in a series of resolutions, the last reading as follows: "We deem it our duty most respectfully, to protest in the most solemn manner, against any attempt to alienate any portion of our fisheries, or our soil, to any foreign power, without the assent of the Local Legislature." "As our fisheries and territorial rights constitute the basis of our commerce, and are the birthright and legal inheritance of our children, we cannot assent to the terms of the convention." The Colonial Secretary's reply recognized this constitutional right: "The proposals contained in the convention having been unequivocably refused by the Colony, they will of course now fall to the ground; the consent of the Legislature of Newfoundland is regarded by Her Majesty's Government as the essential preliminary to any modification of their territorial or maritime rights."[63]

Up to the present the Imperial solidarity between the Imperial and Colonial Governments in dealing with the contentions of the United States in these fishery disputes, has been fairly maintained by the British Government. In a despatch from the American Minister in London to Mr. Secretary Seward in 1866, in which he reported that Lord Clarendon had communicated to him the decision of the British Government "to send out authority to Sir F. Bruce to proceed in conjunction with you after consultation with the respective Provincial Authorities. This had been thought the better course, as the

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that an Act of Parliament has in Great Britain:" Chitty on the Prerogatives of the Crown, page 37.

[63]Prowse's History of Newfoundland, page 474.

latter had now substantially reached such a position of independence as to make it inadvisable for the Government here to attempt to act without regard to them.'[64]

In 1886, Lord Rosebery, in a despatch replying to Mr. Bayard's complaints against the Canadian Government's seizure of American vessels, said: "The matter is one involving the gravest interests of Canada. I now enclose a copy of an approved report of the Canadian Privy Council in which the case of Canada is fully set forth.'[65] And Lord Salisbury, in 1887, was more emphatic when, after informing the Government of the United States of the agreement in views entertained by Her Majesty's Government and the Government of Canada upon the most important points of the controversy respecting the Treaty of 1818, he added that he had "thought it right, in justice to the Canadian Government, to embody almost in their own terms their repudiation of the charges brought against them by Mr. Bayard.'[66]

The action of the Imperial Government in yielding to the arguments of Mr. Secretary Root, may be further tested by transferring these fishery privileges from the colonial to the home territorial coast-waters of Great Britain; and by assuming that French fishermen, within the territorial coast-waters along the south coast of England; or that German fishermen within the territorial coast-waters along the east coast of Scotland, had by treaty, a concession of competing coast fishery privileges with British fishermen similar to those conceded to American fishermen, within the colonial coast-waters of Canada and Newfoundland. Would such arguments, if advanced by the Foreign Secretaries of France or Germany, be yielded to by the Imperial Government proposing a modus vivendi suspending in the interest, and at the urgency of either nation, any of the British fishery laws, operative within such coast-waters, and equally binding upon all British fishermen exercising their trade of fishing within such coast-waters?

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[64]Foreign Relations (U.S.), 1866, Part 1, page 119.

[65]Ibid., 1886, page 395.

[66]Ibid., 1887, page 469.

The question whether the local fishery laws of a nation are binding on the privileged alien citizens of a foreign nation, exercising fishery privileges conceded to them by treaty within the territorial coast-waters of the conceding nation, on conditions similar to those of the Treaty of 1818, as on its own subjects, is, when disputed, peculiarly one to be settled according to the doctrines of International Law, and more especially in view of recent contentions; or by a reference to the Hague Tribunal, and not as desired by an interested Foreign Government.

And if International Law is the final appellate authority, then the disciplinary censure administered by the British Government, at the urgency of the United States Government, to the Responsible Government of Newfoundland because it declined to waive or suspend its fishery laws, is rather a constitutional and diplomatic surprise,—more especially in view of the many previous diplomatic decisions of the British Government on substantially similar contentions, quoted above; and after their affirmance in the Foreign Office Memorandum just issued; for neither the national sovereignty, nor justice, of the Crown, nor appellate legal jurisprudence, permits a re-argument of a final diplomatic or constitutional decision, for the purposes of review, or reversal.

Furthermore the publication of this disciplinary censure has intensified the difficulties of the international situation; and it seems to be a violation of that confidential and reticent policy which is universally recognized as governing incomplete diplomatic discussions; and especially those between a foreign sovereignty and the British Imperial power—composed as it is of a home sovereignty and several colonial self-governing sovereignties, each constitutionally exercising the regal and legislative powers of the Crown; and in which incomplete diplomatic discussions the administration by one of its colonial self-governing sovereignties of such regal and legislative powers respecting the treaty privileges of the alien citizens of such foreign sovereignty, within its colonial territory, is impeached.

THOMAS HODGINS.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

NEGOTIABLE INSTRUMENT—PROMISSORY NOTE—SIGNATURE IN BLANK—AUTHORITY TO FILL UP NOTE TO LIMITED AMOUNT—EXCEEDING AUTHORITY—NEGOTIATION OF PROMISSORY NOTE—"HOLDER IN DUE COURSE"—BILLS OF EXCHANGE ACT, 1882 (45-46 VICT. C. 61) S. 20—(R.S.C. C. 49, S. 32).

Lloyds Bank v. *Cooke* (1907) 1 K.B. 794 was an action on a promissory note. The defence set up the defendant Sanbrook was that this defendant had signed the note in blank and given it to one Cooke with authority to fill it up for £250, and that he, in fraud of the defendant Sanbrook, had filled it up for £1000. The plaintiffs claimed to have in good faith advanced £1000 to Cooke on the note, and to be holders in due course for value. At the trial Lawrance, J., on the authority of *Herdman* v. *Wheeler* (1902) 1 K.B. 361 (noted ante, vol. 38, p. 339) gave judgment in favour of Sanbrook. The Court of Appeal (Collins, M.R., and Cozens-Hardy and Moulton, L.JJ.,) without expressly overruling *Herdman* v. *Wheeler*, the correctness of which however they do not admit, considered that that case was decided under the Bills of Exchange Act, s. 20 (R.S.C. c. 119, s. 32) and that the present case was governed by the common law doctrine of estoppel, and that there was nothing in the Bills of Exchange Act to prevent the application of that doctrine and that the defendant Sanbrook was estopped as against the plaintiff from disputing the validity of the note in question. The decision of Lawrance, J., was accordingly reversed and judgment awarded in favour of the plaintiffs against the defendant Sanbrook.

SHIP—CHARTERER—BILL OF LADING INCREASING LIABILITY OF SHIPOWNER—INDEMNITY BY CHARTERER.

In *Moel Tryvan Ship Co.* v. *Kruger* (1907) 1 K.B. 809 the Court of Appeal (Barnes, P.P.D., and Farwell and Buckley, L. JJ.,) have affirmed the judgment of Phillimore, J., (1906) 2 K.B. 792 (noted ante, p. 245).

SHIP—CHARTER-PARTY—CHARTER OF SHIP FOR VOYAGE—IMPLIED CONDITION THAT SHIPOWNER WILL NOT USE SHIP TO PREJUDICE OF CHARTERER—CARRIAGE OF BUNKER COAL FOR USE ON A FUTURE VOYAGE.

In *Darling* v. *Raeburn* (1907) 1 K.B. 846 the plaintiff had chartered the defendants' vessel for carriage of a cargo to two or three ports of discharge. On arrival of the ship at the first port of discharge the master took on board a large quantity of bunker coal for use on a future voyage of the ship, and in consequence the ship had to be lightened to enable her to get over the bar at the next port of discharge, whereby the plaintiff was put to expense, and but for the loading of the coal she would have been able to enter the port without lightening. Kennedy, J., who tried the case held that the plaintiffs were entitled to the expense to which they had been thus put, (1906) 1 K.B. 572 (noted ante, vol. 42, p. 501) and the Court of Appeal Lord Alverstone, C.J., and Farwell and Buckley, L.JJ.,) have affirmed his decision.

PRACTICE—WRIT—SERVICE OUT OF JURISDICTION—LIBEL IN NEWSPAPER PUBLISHED OUT OF, BUT CIRCULATING WITHIN, JURISDICTION — INJUNCTION — DISCRETION—RULE 64 F—(ONT. RULE 162 F.)

Watson v. *Daily Record* (1907) 1 K.B. 853. Action to restrain the further publication of a libel, and to recover damages for its publication. The libel in question had been published in Glasgow in the defendants' newspaper a few copies of which had been circulated also in England. Leave had been granted to issue the writ for service in Scotland, and the defendants now applied to set aside the order. Lawrance, J., refused to set aside the order, but the Court of Appeal (Collins, M.R., and Cozens-Hardy, L.J.,) considered that, in the proper exercise of discretion, the order should not have been granted to serve the writ out of the jurisdiction, and that notwithstanding an injunction was claimed, the facts seemed sufficiently to shew that no repetition of the alleged libel was reasonably to be apprehended.

PRACTICE—STRIKING OUT DEFENCE—ABUSE OF PROCESS OF COURT.

In *Critchell* v. *London & S. W. Ry.* (1907) 1 K.B. 860 the defendants paid money into Court, with a defence denying liability, with the defence the defendants' solicitors wrote and

sent a letter stating that the traverse of liability was a technical plea merely to secure that the money paid into Court should remain there till the trial unless taken out by the plaintiff in satisfaction, and they unreservedly undertook on behalf of the defendants not to contest liability at the trial. The plaintiff applied to strike out the defence as an abuse of the process of the Court. Walton, J., refused the application, but the Court of Appeal (Cozens-Hardy and Moulton, L.JJ.,) held that he was wrong and granted the application but they granted the defendants leave to take the money out of Court and plead afresh.

MORTGAGE OF LIFE POLICY—VOLUNTARY PAYMENT OF PREMIUMS BY THIRD PARTY—DEATH OF MORTGAGOR—LIEN FOR PREMIUMS —DUTY OF TRUSTEE.

In *Re Tyler* (1907) 1 K.B. 865. The Court of Appeal (Williams, Farwell and Buckley, L.JJ.,) hold that the principle established by *Ex parte James* (1874) L.R. 9 Ch. 609 that the Court of Chancery will not allow its officer, a trustee in bankruptcy, to retain moneys for distribution among creditors, where it would be contrary to fair dealing to do so, is of general application and is not limited to the case of money paid under mistake of law. In the present case a husband mortgaged a policy on his life, and requested his wife on the eve of his bankruptcy to pay the premiums to keep the policy alive. She paid one premium before his bankruptcy, and after his bankruptcy she continued to pay them until his death. There being a surplus after the payment of the mortgage debt, the question arose whether the wife as against the trustee in bankruptcy was entitled to be recouped the premiums paid by her, and the Court of Appeal held that she was.

INDIA STOCK—FRAUDULENT TRANSFER—PERSONATION—IDENTIFICATION OF TRANSFERROR BY BROKER—LIABILITY OF BROKER.

Bank of England v. *Cutler* (1907) 1 K.B. 889 was an action brought by the plaintiffs to recover the loss which the plaintiffs had been put to, by reason of their having transferred certain India stock upon a fraudulent transfer, the person executing the same having been identified to the plaintiffs by the defendant a broker as the true owner of the shares. According to the custom of the plaintiffs they refused to enter transfers on their books,

which are invalid until so entered and registered, without first receiving from a broker an identification of the transferror as the owner of the stock sought to be transferred. The defendant identified the transferror, but it afterwards turned out that she was fraudulently personating the real owner, and upon the faith of the transfer the plaintiffs made the entry. Subsequently on the application of the true owner the plaintiffs were compelled to purchase new stock to replace that so transferred, and claimed to recover from the defendant the loss thus sustained. Lawrence, J., held that the defendant was liable and gave judgment for the plaintiffs for the amount claimed.

MASTER AND SERVANT—DRIVER OF MOTOR OMNIBUS—"WORKMAN" —EMPLOYERS LIABILITY ACT, 1880 (43-44 VICT. C. 42) S. 8 —EMPLOYERS AND WORKMEN ACT, 1875, (38, 39 VICT. C. 90, S. 10—(R.S.O. C. 160, S. 1 (3)).

In *Smith* v. *Associated Omnibus Co.* (1907) 1 K.B. 916 a Divisional Court (Darling and Lawrence, JJ.,) held that the driver of a motor omnibus who has, when out with the omnibus, to do such necessary repairs as he is able to do, is a "workman" within the meaning of the Employers Liability Act, 1880, and Employers and Workmen Act, 1875 (see R.S.O. c. 160, s. 1 (3)).

PAUPER—POOR LAW GUARDIANS—INMATE OF WORKHOUSE—LIABILITY OF GUARDIANS—MASTER AND SERVANT—COMMON EMPLOYMENT.

Tozeland v. *West Ham* (1907) 1 K.B. 920 was an action of tort brought by a pauper inmate of a workhouse against the guardians of the poor, to recover damages in the following circumstances. The defendants were carrying out an enlargement of electric light installation in the workhouse of which the plaintiff was a pauper inmate, by means of their own servants, the work being under the supervision of a permanent official of the workhouse. The plaintiff with other inmates was ordered to assist and was put to work on a staging which owing to its improper construction gave way, causing the plaintiff the injuries complained of. The defendants contended that the defendant was in the position of a servant and the doctrine of Common Employment relieved defendants from liability. The action was tried in the County Court and the plaintiff recovered

judgment for £100 which was affirmed by the Divisional Court (1906) 1 K.B. 538 (noted ante, vol. 42, p. 417). The Court of Appeal (Barnes, P.P.D., and Farwell and Buckley, L. JJ.,) have not been able to agree with that conclusion, and though they hold that the employment of a pauper in such circumstances is not contractual, but statutory, and therefore the defence of common employment in such a case is no answer, yet they hold, that the setting of paupers to work is part of the statutory duties imposed by statute on the guardians, and an action by the pauper for negligence of one of their officers will not lie against the guardians.

WILL—CONSTRUCTION—"BORN IN MY LIFETIME"—POSTHUMOUS CHILD—DIVESTING CLAUSE—CHILD EN VENTRE SA MERE.

In *Villar* v. *Gilbey* (1907) A.C. 139 the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James, Robertson, and Atkinson) have reversed the decision of the Court of Appeal (1906) 1 Ch. 538 (noted ante, vol. 42, p. 422) and have restored the judgment of Eady, J. (1905) 2 Ch. 301 (noted ante, vol. 41, p. 835). The case turns on the construction of a will whereby the testator devised to his brother's first and second sons (who were alive at the date of the will) successively for life, with remainder to their first and other sons in tail, with remainder to the brother's third and other sons successively in tail; but he declared his intention to be that any third or other son "born in my life time" should not take any larger interest than an estate for life with remainder to their issue in tail. The first and second sons died without issue, the third son was en ventre sa mere at the testator's death, and the question was therefore whether he took an estate tail or merely an estate for life under the proviso regarding sons born in the testator's lifetime. Eady, J., had held that the third son though en ventre sa mere was not born in the testator's lifetime, and therefore took an estate tail, the Court of Appeal on the other hand thought there was a fixed rule that a child en ventre sa mere was to be deemed to have been born, and therefore that the third son only took an estate for life with remainder to his issue in tail. Their Lordships determine that Eady, J., was right, and that the supposed rule of construction whereby a child en ventre sa mere is to be deemed as born, is only applicable where it is necessary for the benefit of the child.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] BALDOCCHIE *v.* SPADA. [May 7.

Insolvency—Fradudulent preference—Security to creditor—Knowledge of insolvency.

G. had assisted S. with loans and also guaranteed his credit at a bank to the extent of $3,000. His own cheque at the bank was refused payment until the indebtedness of S. was settled, and the latter promised to arrange it within a month, which he did by transferring to G. a quantity of goods pledged to another bank, G. paying the amount due thereon. Shortly after S. sold out his stock in trade and absconded owing large amounts to foreign creditors and being insolvent. In an action to set aside the transfer of goods to G. as a fraudulent preference under R.S.O. 1897, c. 147, the manager of the bank which refused G.'s cheque testified at the trial that it was not because the solvency of S. was doubted but only that he had heard that S. was dealing with another bank, and he wanted the account closed.

Held, IDINGTON and DUFF, JJ., dissenting, that under the evidence produced G. had no reason to suppose that S. was insolvent and he had satisfied the onus placed on him by the statute of shewing that he had not intended to hinder, delay or defeat creditors. Appeal dismissed with costs.

McKay and *Gideon Grant,* for appellant. *Tytler* and *R. G. Smythe,* for respondents.

Ont.] AMES *v.* CONMEE. [May 7.

Broker—Stock—Purchase on margin—Pledge of stock by broker—Possession for delivery to purchaser.

C. instructed A. & Co., brokers, to purchase for him on margin 300 shares of a certain stock paying them $3,000 leaving a balance of $6,225 according to the market price at the time. A. &

Co. instructed brokers in Philadelphia to purchase for them 600 shares of the stock, paying $9,000, nearly half the price and pledged the whole 600 for the balance. The Philadelphia brokers pledged these shares with other securities to a bank as security for indebtedness and latter drew on A. & Co. for the balance due thereon, attaching the scrip to the draft which was returned unpaid and 475 of the 600 shares were then sold and the remaining 125 returned to A. & Co. In an action by the latter to recover from C. the balance due on the advance to purchase the shares with interest and commission,

Held, reversing the judgment of the Court of Appeal (12 O.L.R. 435; 42 C.L.J. 720, Fitzpatrick, C.J., dissenting, that A. & Co. never had the shares for delivery to C. on payment of the amount due by him, and therefore could not recover.

2. The broker had no right to hypothecate the shares with others for a greater sum than was due from C. unless he had an agreement with the pledgee, whereby they could be released on payment of said sum. The bought note of the transaction contained this memo.: "When carrying stocks for clients we reserve the right of pledging the same or raising money upon them in any way convenient to us."

3. Per DAVIES and IDINGTON, JJ., that this did not justify the brokers in pledging the shares for a sum greater than that due from the customer. Appeal allowed with costs.

Millar, for appellant. *Tilley*, for respondents.

Yukon Terr.] LAMB *v.* KINCAID. [May 7.

Placer mining—Disputed title—Trespass pending litigation—Color of right—Invasion of claim—Adverse acts—Sinister intention—Conversion—Blending materials — Accounts — Assessment of damages—Mitigating circumstances—Compensation for necessary expenses—Estoppel—Acquiescence.

After a favourable judgment by the Gold Commissioner in respect to the boundary between contiguous placer mining locations and while an appeal therefrom was pending, the defendants, with the knowledge of the plaintiffs, entered upon the location and removed a quantity of auriferous material from the disputed and undisputed portions thereof, intermixed the pro-

ducts without keeping any account of the quantities taken from these portions respectively, intermixed the products and appropriated the gold recovered from the whole mass.

In an action for damages taken subsequently the plaintiffs recovered for the total value of the gold, estimated to have been taken from the disputed portion of the claim, without deduction of the necessary expenses of workings and winning the gold.

Held, affirming the judgment appealed from, DAVIES, J., dissenting, that a correct appreciation of the evidence disclosed a sinister intention on the part of the defendants that they had deliberately blended the materials taken from both parts of the location, converted the whole mass to their own use and thereby destroyed the means of ascertaining the respective quantities so taken and the proportionate expense of recovering the precious metal therefrom, and that, consequently, they were liable in damages for the total value of so much of the intermixed products as were not strictly proved to have come from the undisputed portion of the location.

Quære. Does the English rule governing the assessment of damages in respect of trespasses in coal mines supply a method of assessment applicable in its entirety to placer mining locations? Appeal dismissed with costs.

Ewart, K.C., for appellant. *Holman*, K.C., and *Gwillim*, for respondent.

Ex. Ct.] McLEAN *v.* THE KING. [May 7.

Subaqueous mining—Crown grants—Dredging lease—Breach of contract—Subsequent issue of placer mining licenses—Damages—Pleading and practice—Statement of claim—Demurrer—Cause of action.

A statement of claim which alleges that the Crown, after granting a lease of areas for subaqueous mining and while that lease was in force, in derogation of the rights of the lessee to peaceable enjoyment thereof, interfered with the rights vested in him by transferring the leased areas to placer miners who were put in possession of them by the Crown to his detriment, discloses a sufficient cause of action in support of a petition of right for the recovery of damages claimed in consequence

of such subsequent grants. Judgment appealed from (10 Ex. C.R. 390) reversed, DAVIES and IDINGTON, JJ., dissenting.

DAVIES, J., dissented on the ground that there was no sufficient allegation in the petition either of interference with the submerged beds or bars of the stream, which alone were included in the dredging lease, or of such active interference by the Crown as would justify an action. Appeal allowed with costs.

Shepley, K.C., for suppliant. *Chrysler*, K.C., for respondent.

Alta.] LAFFERTY *v.* LINCOLN. [May 7.

Constitutional law—Legislative jurisdiction—Con. Ord. N.W.T. c. 52—6 Edw. VII. c. 28 (Alta.)—Medical profession—Practising without license.

Prior to the erection of the Province of Alberta by the "Alberta Act," 4 & 5 Edw. VII. c. 3 (D) "The College of Physicians and Surgeons of the North-West Territories," was incorporated under the "Medical Profession Ordinance," c. 52 of the Consolidated Ordinances of the North-West Territories, and its members had the exclusive right to practice medicine and surgery for gain and reward in the North-West Territories of Canada. By the effect of s. 16 (3) of the "Alberta Act" the college was continued in existence, subject to being "dissolved and abolished by order of the Governor in Council." No Order in Council was passed to dissolve or abolish the college, but, by the "Medical Profession Act" of Alberta, c. 28 of the statutes of 1906, the "College of Physicians and Surgeons of the Province of Alberta" was incorporated, provision made for the registration of members of the "College of Physicians and Surgeons of the North-West Territories," and of other persons, as members of the "College of Physicians and Surgeons of the Province of Alberta," giving members so registered the exclusive right to practice medical-surgery, etc., for gain or reward in the Province of Alberta, and prohibiting unregistered persons from so practising under a penalty. The respondent was a duly registered member of the "College of Physicians and Surgeons of the North-West Territories," but neglected to register as a member of the "College of Physicians and Surgeons" of the Province of Alberta, and continued to practice medicine, surgery, etc., without the qualification and license

required by the "Medical Profession Act" of Alberta. He was convicted of the offence created by this Act, but, on a case stated the Supreme Court of the North-West Territories quashed the conviction and declared the Act ultra vires of the Province of Alberta.

Held, reversing the judgment appealed from, the Legislature of the Province of Alberta had jurisdiction to enact the statute in question without the formality of an Order in Council dissolving and abolishing the "College of Physicians and Surgeons of the North-West Territories," and that the conviction of the respondent under the "Medical Profession Act of Alberta," should be affirmed. *Dobie* v. *The Temp. Board* (7 App. Cas. 136) distinguished.

Appeal allowed with costs.

Woods, and *Young,* for appellant. *J. A. Allan,* for respondent.

Ex. Ct.] [May 13.

PROVINCE OF ONTARIO *v.* DOMINION OF CANADA.

Constitutional law—Liabilities of province at confederation—Special funds—Rate of interest—Trust funds or debt—Award of 1870.

Among the assets of the Province of Ontario at Confederation were certain special funds, namely, U.C. Grammar School Fund, U.C. Building Fund, U.C. Improvement Fund, and the province was a debtor in respect thereto and liable for interest thereon. By B.N.A. Act, 1867, s. 111., the Dominion of Canada succeeded to such liability and paid the province interest at five per cent. up to 1904. In the award made in 1870 and finally established in 1878 on the arbitration under s. 142 of the Act to adjust the debts and assets of Upper and Lower Canada, it was adjudged that these funds were the property of Ontario. On appeal from the judgment of the Exchequer Court in an action asking for a declaration as to the rights of the province in respect to said funds,

Held, affirming said judgment (10 Ex. C.R. 292). IDINGTON, J., dissenting, that though before the said award the Dominion was obliged to hold the said funds and pay the interest thereon to Ontario, after the award the Dominion had a right to pay

over the same with any accrued interest to the province, and thereafter be free from liability, in respect thereof.

Held, also, that until the principal sum was paid over the Dominion was liable for interest thereon at the rate of five per cent. per annum. Appeal dismissed with costs.

Irving, K.C., *Ritchie*, K.C., and *Shepley*, K.C., for appellant. *Newcombe*, K.C., and *Hogg*, K.C., for respondent.

Ont.] VALIQUETTE *v.* FRASER. [May 13.

Negligence—Construction of building—Contract for construction—Collapse of wall—Building not completed—Vis major.

Held, per DAVIES and MACLENNAN, JJ., that the owner of a building in course of construction owes to those whom he invites into it or upon it the duty of using reasonable care and skill in order to have the property and appliances upon it intended for use in the work fit for the purposes they are to be put to. Such duty is not discharged by the employment of a competent architect to prepare plans for the building and a competent contractor to attend to the work of construction.

Per IDINGTON, J.:—The fact that the building is in an unfinished state may render the obligation of the owner towards a workman employed upon it less onerous in law than it would be in the case of a completed structure.

Per DUFF, J.:—Does the rule governing the duty of occupiers respecting the safe condition of the premises apply without qualification where the structure is incomplete, and the invitee is engaged in completing it or fitting it for its intended use?

Per DAVIES and MACLENNAN, JJ.:—In the present case the failure to guard against the effect of a sudden storm of so violent and extraordinary a character that it could not have been expected, was not negligence for which the owner was liable.

Judgment of the Court of Appeal, 12 O.L.R. 4, and of the Divisional Court, 9 O.L.R. 57, affirmed. Appeal dismissed with costs.

Lorne McDougall, Jr. for appellant. *Shepley*, K.C., and *John Christie*, for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] EMBREE *v.* MCCURDY. [June 5.

Jurisdiction—Appeal pending—Application for injunction or receiver after security for costs given.

On an application to the Court of Appeal, in a partnership action in which the plaintiff had a judgment in his favour, but an appeal to the Court of Appeal was pending, the security for costs having been given, for an order for an injunction to prevent the defendant from dealing with partnership moneys, or for a receiver. On objection taken that there was no jurisdiction in the Court to make such an order,

Held, that a single judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any party pending an appeal, and that what may be done by a single judge during vacation can be done by the Court at any other time; and that the Court of Appeal for the purposes of appeals, etc., has all the power, authority and jurisdiction by the Judicature Act vested in the High Court and the order was granted.

B. N. Davis, for the motion. *F. E. Hodgins,* K.C., contra.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P., MacMahon & Teetzel, JJ.] [April 2.

CUFF *v.* FRAZEE STORAGE & CARTAGE CO.

Evidence of witness at a former trial—Reception of at subsequent trial—Absence of witness—Diligent search for.

Where a witness has given oral testimony under oath in a judicial proceeding in which the adverse litigant had the power to cross-examine, the testimony so given will, if the witness himself be incapable of being called, be admitted in any subsequent suit between the same parties or those claiming under

them, if such suit relate to the same subject or substantially involve the same material questions.

And in an action in which a witness had given evidence at a trial but on appeal a new trial of the action was granted for which he could not be found it was sought to have his evidence given in the first trial used on the second.

It was shewn that the witness had called at the defendant's place of business between the two trials and stated that he was going to the "other side" and that on enquiries being made a couple of weeks before the second trial at his address, where he had been stopping the persons there could not tell his address except that he had gone to the States, they thought to Cleveland,

Held, that it was not necessary to prove that he was out of the jurisdiction and that the answers to the enquiries were admissible to prove the unsuccessful search for the witness and the inability to find him and should not be treated as hearsay evidence and that sufficient diligent enquiry was shewn and the evidence of the witness should have been received.

Munro v. *Toronto Railway Co.* (1904) 9 O.L.R. 299 at p. 312 distinguished.

Held, also, that there was sufficient evidence to entitle the plaintiff to have the case left to the jury.

Judgment of ANGLIN, J., reversed.

Wm. M. Hall, for the appeal. *Godfrey* and *Phelan*, contra.

Riddell, J.] RUETSCH *v.* SPRY. [April 11.

Vendor and purchaser—Sale of house and portion of land—Fence on boundary line—Interference with enjoyment of vendee's portion—Derogation from grant—Injunction.

Defendant being the owner of certain land on the east end of which was a house which was lighted by windows on the west side, sold part of the land including the part upon which the house was built to the plaintiff. After an action to determine the boundary line which had been incorrectly defined in the deed and which was decided in the action to be very close to the house the defendant built a high close board fence entirely on his own land but up to the boundary line.

Held, in a second action that the defendant could not derogate from his own grant and as the trial judge found on the

evidence that the fence cut off the light and by excluding the air impaired the ventilation, and as the snow and ice collected in the narrow space between the fence and the house from which it could not be removed and when melting in the spring the water could not run away but soaked through the walls of the house, the plaintiff was deprived of the comfortable and reasonable enjoyment of the house, which he had a right to expect and an injunction was granted restraining the defendant from continuing the fence in such a way as to interfere with such enjoyment.

O'Connell and *Gordon*, for plaintiff. *Edmunson*, K.C., for defendant.

Britton, J.] EMBREE *v.* MCCURDY. [May 10.

Action pending in Court of Appeal—Application in High Court —Further proceedings—Con. Rule 829.

In an action for a declaration that a partnership existed and for a dissolution and an account, in which judgment was obtained by the plaintiff but by leave an appeal to the Court of Appeal was pending, the security being given.

Held, that an application to a High Court judge for an injunction to restrain the defendant from dealing with partnership moneys was "a further proceeding....other than the issue of the judgment or order and the taxation of costs thereunder" under Con. Rule 829, and the High Court judge could not entertain it.

B. N. Davis, for the motion. *Middleton*, contra.

Correspondence.

THE BENCH AND THE PRESS.

To the Editor of THE CANADA LAW JOURNAL:

SIR.—I note your criticism of the Toronto press on its abuse of the Judicial Committee of the Privy Council. I agree with you, as I believe almost everyone outside Toronto does, and I trust a good many inside it. But I think you take the Toronto press altogether too seriously—you view it at close range and it looks larger that it really is.

There is something peculiar about the greater part of the

Toronto press at the present time—it is out of touch with the trend of thought in Canada. Time was when the *Globe* was a true exponent of liberal principles. Given certain facts, you could tell just where that paper would strike and why. To-day a *Globe* editorial suggests a cross between a Sunday school teacher's address and a stump speech by a mugwump. It takes a little run at passing events, backs up a little, takes another run, butts in in another place, and then harks back again into smugness. The *Mail and Empire* has a bad liver and nothing agrees with it and nothing is bad enough for its political opponents. The *News* should head its editorial columns with the story of the old Scotchman who prayed for himself, his wife, his son Jock and Jock's wife, and suggested to an all-wise Providence that all others should be given a short shrift and no mercy. The *News* has a black list on which the editor has the name of almost everyone, including, I suppose, your own. However, you need not worry as on that list are the names of kings, lords, members of parliament, princes, popes, premiers, prophets and priests, in fact, the names of all the best people. The editor of the *News* knows everything and knows that he knows it; he also knows that nobody else knows anything. That's why he takes himself so seriously. The *Presbyterian* knows everything that took place long ago, especially things outside its proper sphere. A friend suggests it should be given a place in one of those old pictures of Pope and Pagan in Pilgrim's Progress, who are represented as toothless and impotent and that a third figure should be inserted and the picture re-named, Pope Pagan and Presbyterian. Not one of these papers has any influence outside Toronto. Men who for a generation looked for their political guidance to the *Mail* or the *Globe* do so no longer. The *News*, fallen from its high ideals, has developed into a disgruntled critic.

I do not know why the Toronto press should be so narrow, but it is unquestionable that it is not in touch with the people, both east and west of Ontario, and, I venture to say, with a large part of the denizens of Ontario. A single phase of this narrowness has struck you as a lawyer, but the montanist attitude of the Toronto press is not by any means confined to matters legal. To read the lectures which these editors give one another is an illiberal education. Each one of them is a rascal according to every other one and so is nearly every other person.

Let me commend you for bearding the lions in their own den.

Morden, Man. A. McLeod.

Canada Law Journal.

VOL. XLIII. AUGUST. NO. 15 AND 16.

WAIVING THE BENEFIT OF STATUTES.

Quilibet potest renunciare juri pro se introducto is a well recognized maxim of the law, and there are many cases in which it has been held to enable a party to waive the benefit of statutory enactments intended for his protection. The benefit of Statutes of Limitations it is well known may be waived by a defendant, and though a statute says "no action shall be brought" after a specified time, it is perfectly plain that a defendant may neglect, or refuse to set up the defence that an action is not brought within the prescribed time, and that the Court will not in such a case regard the statute as any obstacle to the plaintiff succeeding. So also a defendant may waive the benefits of the provisions of the Statute of Frauds, though that statute also says "no action shall be brought" in certain cases. He may also waive the provisions of the Bills of Exchange Act requiring notice of protest. But in order that a person may waive the benefit of any statutory provision, its application to the particular case must be of such a character as to be intended merely for his own benefit and protection; if the statutory provision is intended not only for his protection, but also that of others, or is a matter in which the public have interest, he cannot waive it. For this reason a testator cannot dispense with the provisions of the Wills Act in regard to the execution of wills, because such provisions are not made merely for the benefit of testators only, but also for the protection of their heirs and next of kin.

There are some statutes passed for the protection of a particular class of people; for instance, the Workmen's Compensation Act for the benefit of workmen, or the Fatal Accidents Act, for the benefit of the representatives of persons killed in duels or through the negligence of others, in which the question has arisen how far contracts can be validly made to waive the benefit of their provisions. The possibility of such contracts being made

in reference to the Workmen's Compensation Act, R.S.O. c. 160, is clearly recognized by sec. 10, which regulates such contracts, and, but for that section, there would have been nothing whatever to prevent such a contract being made: see *Griffiths* v. *Dudley*, 9 Q.B.D. 357; *The Queen* v. *Grenier*, 30 S.C.R. 42.

By 4 Edw. VII. c. 31 (D.), an absolute prohibition is in effect made against railway companies and their employees making any bargain or agreement relieving railway companies from liability for damages for personal injuries to their employees. The constitutional validity of this Act was recently affirmed by the Judicial Committee of the Privy Council: *Grand Trunk Railway* v. *Attorney-General of Canada*, 1907, A.C. 65, 95 L.T. 131, and the Act was duly proclaimed to come into force on 1st April last; see *Can. Gazette*, 12 Jan., 1907, p. 1581, and this would seem to be one of those Acts which it is not possible for those for whose benefit it is intended to waive.

Recently the Legislature of Ontario passed a statute practically making null and void all agreements as to the place of trial of any action, subject to certain conditions: see 6 Edw. VII. c. 19, s. 22. In the case of *Shupe* v. *Young* recently before the Divisional Court, the plaintiff had sold certain chattels on credit and stipulated that in default of payment the action to recover the price might be brought in a specified Division Court and the purchaser expressly agreed to waive the provisions of the above mentioned statute.

The plaintiff having commenced the action in a Division Court pursuant to the agreement, the defendant applied for a prohibition on the ground that the cause of action had not arisen within the jurisdiction of that Court, and the defendant did not reside therein, and that the agreement as to venue was void. Falconbridge, C.J. K.B., granted a prohibition, holding that it was not possible for the defendant to waive the protection of the statute, and the Divisional Court (Boyd, C., and Magee and Mabee, JJ.) affirmed his decision.

The words of the statute in question are no doubt emphatic, viz.: "No proviso, condition, stipulation, agreement or statement

which provides for the place of trial of any action, matter or other proceeding shall, subject to the provisions hereinafter set out, be of any force or effect."

It was suggested in the course of argument that as the statute makes all agreements as to venue void the agreement to waive its provisions would not make good an agreement which the statute made void, but the answer to that proposition seems to be, that as it is only by virtue of the statute that the agreement is made void, if the provisions of the statute are waived, then they do not affect the particular agreement, and consequently it must be of the same validity as if there were no such statute. Furthermore, it may be remarked that the words of the statute in question are no more emphatic than those to be found in Statutes of Limitation or the Statute of Frauds, viz.: "No action shall be brought, etc.," and yet actions may not only be brought, but may succeed, if the defendant chooses to refrain from setting up the statute. And, notwithstanding the emphatic words of the statute in question in *Shupe* v. *Young*, it would have been possible for the defendant to have waived the benefit of the statute, by refraining from setting up the question of venue. That being so, the question naturally arises if he could waive it negatively by not claiming the benefit of its provisions, on what sound principle can it be said that he could not waive it affirmatively by express agreement? Are agreements as to venue of such a public nature that statutory provisions relating thereto cannot be waived? But for this decision we should have thought not. On the other hand, railway employees may possibly be regarded as exposed to peculiar risks, and as such to be protected by statutes whose provisions they cannot waive.

ASSIGNMENT OF DEBTS.

A learned correspondent for whose opinion we entertain the greatest respect thinks that our note in reference to *Mills* v. *Small* (ante p. 436) is wrong. He says that in the English case there referred to "the assignee was to collect the accounts, and,

after paying costs, to turn the amounts over to the assignor. Whereas, in *Mills* v. *Small*, the assignors were to pay costs. The assignee was not to collect the debts at all; he was not to pay costs, nor to pay anything to the assignors. The assignors were to pay the costs, and pay him. The assignee was not to sue or do anything, except to allow his name to be used."

With all deference we are unable to acquiesce in the subtle distinction which our correspondent draws.

In both cases the assignees had no beneficial interest in the debts assigned, in both cases the assignment was made for the purpose of enabling the action to be brought in the name of the assignee. In our view, the fact that in *Mills* v. *Small* the assignee was to put himself in the hands of the assignors and allow them to use his name, is a distinction without a difference. In both cases the assignee was substantially trustee for the assignor.

We can see no real distinction between an assignee who is to sue and one who is "to allow his name to be used" as plaintiff. In either case the assignee is actually and de facto the plaintiff; and to attempt to distinguish cases on such grounds is, it appears to us, to render the law needlessly difficult and incomprehensible.

We may refer to *Comfort* v. *Betts* (1891) 1 Q.B. 737 as shewing that the only question the Court has to be satisfied of is that the assignment is absolute in form.

INEFFECTUAL WILLS.

It is somewhat curious to observe how frequently testators are desirous not only of giving legacies, but also of preventing their legatees from acquiring dominion over such legacies until the legatees have reached a specified age exceeding twenty-one years, and it is a matter of further interest to the practitioner to observe how often such restrictions on the enjoyment of legacies are ineffectual. The testator or his draftsman too often fail to bear in mind that a simple bequest of a legacy to A., with an added direction to accumulate until A. attains twenty-five or thirty, as

the case may be, and an express direction to postpone payment until then, vests immediately, and the legatee upon attaining twenty-one is entitled to payment. The subject was dealt with by Lord Hatherley (when Vice-Chancellor Wood) in some observations that fell from his Lordship in the course of his judgment in the case of *Gosling* v. *Gosling* (Johns. 265). "The principle of this Court," said his Lordship, "has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age, unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment—or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the Court to hold that, as to the previous rents and profits, there has been an intestacy—the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it until they attain the age of twenty-five years." That doctrine was quite recently applied by Mr. Justice Joyce in a case of *Re Conturier, Conturier* v. *Shea* (noted 122 L.T. Jour. 464; (1907) 1 Ch. 470). There a testatrix desired and directed to set apart the sum of £200 for her grandson W., the sum of £150 for her grandson V., and the sum of £150 for her grandson D., the said sums to be free of duty, and to be paid respectively as to £50, part thereof, on their attaining the age of twenty-one years, and as to £50, part thereof, on their attaining the age of twenty-five years, and the testatrix directed that the balance £100 for her grandson W. be paid to him on his attaining the age of thirty years, and the balances of £50 for V. and D.

to be paid to them on their respectively attaining the age of thirty years. The will contained no disposition of the intermediate income or gift over of the principal. W. survived the testatrix, and on attaining twenty-one the sum of £50 was paid to him; but he died before attaining twenty-five. The question was whether notwithstanding W.'s death under the age of twenty-five, he was not entitled to the other sums of £50 and £100, and Mr. Justice Joyce held that W. was so entitled. "I consider," said his Lordship, "these bequests equivalent to a gift of a legacy to the legatee payable as to part at twenty-one, further part at twenty-five, and the balance at thirty. According to the principal of the decision in *Gosling* v. *Gosling*, I am, therefore, of opinion that each of these legatees upon attaining twenty-one is entitled to the payment of his legacy with the intermediate interest or income, and that the legal personal representative of any legatee who survived the testatrix and died before actual payment is entitled to the legacy or balance remaining unpaid of both income and principal."—*Law Times.*

We are pleased to record the knighthood conferred on Sir Charles Fitzpatrick, Chief Justice of the Supreme Court of Canada. It is right and proper that this honour should be conferred upon those who have been thought fit to occupy the high position of Chiefs of our Superior Courts and especially the Chief Justice of our Court of last resort in the Dominion. Personally the occupant of that high position is a worthy recipient of the honour, and we trust that he may live long to enjoy it.

It is scarcely necessary to say that the voice of the legal profession as well as that of every other thinking and intelligent person is entirely in accord with the sentence passed by Col. Denison, Police Magistrate of the City of Toronto, upon a baseball player named Flood, who brutally assaulted the umpire of the game in which he was playing. The only mistake the Police Magistrate made was in not giving him a month in

prison instead of a fortnight. Such an act is bad enough anywhere; but it is not expected from those who are engaged in manly and healthy sports. It was said by some newspaper (which by the way, spoke of this rowdy as though he were a very important person and a not unworthy public character), as being about to retire from sport. It is to be hoped so, for any man who cannot keep his temper and behave with ordinary decency in a game is not fit company for even "professional ball players," and many of them are low enough in all conscience.

In accordance with the prayer of a petition to the Department of Justice at Ottawa the pardon of this offender was recommended and he was released at the end of ten days. The petition was largely signed and of course there was no difficulty about that; but all law abiding citizens were surprised at seeing in the petition the names of men holding high positions of trust in the administration of public affairs. The only possible reason could be the blight of party politics. These representative men should not have signed the petition and this pardon should not have been recommended. It was a blow below the belt to manly games and an apotheosis of blackguardism.

Some theologians assert that an increase of lawlessness will be one of the signs of the closing up of the present dispensation. However, that may be, this spirit appears to be on the increase, and notably so in places where least expected. We have had occasion to refer to this sort of thing before (ante, page 87). On the present occasion the offenders were the chief magistrate and one of the controllers of a city of "over one hundred thousand inhabitants" (as the Ontario statutes describe the capital of that province). The former, being a lawyer, might have known better. The latter, being a newspaper man, did that which was not unnatural, for much of the press of Toronto has become notorious for its lawless utterances. The incident referred to was in connection with a procession in the streets of the city in question. This procession took possession of a thoroughfare

and stopped the running of street cars, which, with the public, have the legal right of way. The mayor and the controller are reported as having supported the processionists in their unlawful conduct and congratulated them on their having taught a lesson to the street railway authorities who had thus in the interest of the public presumed to exercise their legal rights to the annoyance of those who thus illegally obstructed the highway. Such an exhibition of lawlessness on the part of those in authority, if the speeches of the gentlemen referred to are correctly reported, is much to be deplored. There is but little use in passing laws if those appointed to enforce them not only neglect so to do, but actually commend those who break them.

One of the conditions on which the street railway operates in that city, and which, of course, was perfectly well-known both to the mayor and controller is as follows: "Cars to have right of way, and vehicles or persons not to obstruct or delay their operation." The railway had given due notice that it intended to insist on its rights, which, we may observe, are conferred on it for the benefit of the public, to whom the obstruction of the cars may involve serious inconveniences.

It might be thought open to doubt how far an agreement between the city and the street railway giving the latter the right of way would be binding on the public at large; but the general Street Railway Act, R.S.O. c. 208, s. 25(7) expressly empowers municipalities to pass by-laws, inter alia, "for preventing the obstructing or impeding of the ordinary traffic, and for compelling vehicles on the tracks to give place to the cars or other conveyances of the company." The condition above referred to is a part of a by-law, and it was conferred and declared to be valid and binding on the railway and the city by an Act of the provincial legislature. The words "for preventing the obstructing and impeding of the ordinary traffic" we take it must mean the ordinary traffic of the railway, not the ordinary traffic of the street; and it would seem that the right of way of the street railway is reasonably clear.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

SHIP—SALVAGE AGREEMENT—PRINCIPAL AND AGENT—MASTER.

The Crusader (1907) P. 196. This was an appeal from the judgment of Barnes, P.P.D. (1907) P. 15 (noted ante p. 280); and the Court of Appeal (Lord Alverstone, C.J., and Moulton and Kennedy, L.JJ.) have unanimously affirmed his decision.

ADMIRALTY—COLLISION—TOTAL LOSS—PAYMENT OF DAMAGES BY WRONG DOER—RIGHTS OF INSURED AND INSURER IN MONEY RECOVERED FROM WRONG DOER.

The Commonwealth (1907) P. 216 was an admiralty case involving a point of insurance law. A vessel had been run down in a collision and was a total loss. The value was assessed by the Court at £1,000 which amount was paid into Court by the wrong doers. The vessel had been insured for £1,000 under a policy stating the value to be £1,350. The underwriters having paid the owners the amount of the insurance thereupon claimed the £1,000 paid into Court, but Deane, J., held, and the Court of Appeal (Barnes, P.P.D., and Moulton and Kennedy, L.JJ.) agreed with him, that the owners were entitled to be treated as their own insurers for £350, and that the money in Court was therefore divisible $\frac{350}{1350}$ths to the owners, and the remaining $\frac{1000}{1350}$th to the underwriters.

LANDLORD AND TENANT—COVENANT BY LESSOR TO PAY "ALL RATES AND TAXES"—WATER RATES.

Bourne v. *Salmon* (1907) 1 Ch. 616 was a summary application to determine the simple question whether water rates were included in the expression "all rates and taxes." The plaintiff's were lessees of certain premises under a lease whereby the defendants, their lessors, covenanted to procure to be paid "all rates and taxes" payable in respect of the demised premises; nevertheless they had claimed that the plaintiffs were bound to pay a proportionate part of the water rates. Buckley, J., following *Direct Spanish Telegraph Co.* v. *Shepherd*, 13 Q.B.D. 202, but against his own personal conviction, held that water rates were included and that the defendants were liable therefor, and

the Court of Appeal (Cozens-Hardy, M.R., Barnes, P.P.D., and Kennedy, L.J.) affirmed his decision, and declined to overrule the case he had followed.

COPYRIGHT—AGREEMENT FOR EXCLUSIVE PUBLICATION—AUTHOR AND PUBLISHER — ASSIGNMENT OF COPYRIGHT — COPYRIGHT ACT, 1842 (5-6 VICT. C. 45) SS. 2, 13.

Re Jude (1907) 1 Ch. 651 was an appeal from the decision of Kekewich, J. (1906) 2 Ch. 595 (noted ante p. 248), and the Court of Appeal (Lord Alverstone, C.J., and Moulton and Buckley, L.J.J.) have affirmed his decision.

ANCIENT LIGHTS—EASEMENT—ALTERATION OF DOMINANT TENEMENT—INCREASED BURDEN ON SERVIENT TENEMENT—DESTRUCTION OF EASEMENT—ACTION FOR DECLARATION THAT TENEMENT IS NOT SUBJECT TO EASEMENT.

In *Ankerson* v. *Connelly* (1907) 1 Ch. 678 the Court of Appeal (Cozens-Hardy, M.R., and Barnes, P.P.D., and Kennedy, L.J.) have affirmed the judgment of Warrington, J. (1906) 2 Ch. 544 (noted ante p. 54), but have not adopted all his reasons.

MORTGAGE OF PROCEEDS OF SALE OF LAND—PAYMENT INTO COURT —RIGHTS OF MORTGAGEES IN FUND IN COURT—REAL PROPERTY LIMITATION ACT, 1833 (3-4 WM. IV. C. 27) S. 34—REAL PROPERTY LIMITATION ACT, 1874 (37-38 VICT. C. 57) S. 8—(R.S.O. C. 72, S. 1(*b*))—(R.S.O. C. 133, S. 23).

In re Hazeldine (1907) 1 Ch. 686, disposes of an important question under the Real Property Limitation Act (see R.S.O. c. 72, s. 1(*b*) and R.S.O. c. 133, s. 23). Certain persons who were entitled to a beneficial interest in lands vested in trustees with power to sell in 1889 mortgaged their shares in the land and in the proceeds thereof to the Union Deposit Bank. They also mortgaged their interest in the same property to other persons; the lands were sold by the trustees, and in consequence of the conflicting claims of the various mortgagees the shares of the mortgagors in the proceeds were in 1896 paid into Court. No payment or acknowledgment of right had since been given by the mortgagors to the bank, and the mortgagors now applied for payment out of the money to them, contending that the claim of the bank both on the covenant and as against the land was barred

by the Statutes of Limitations; but Warrington, J., held that although that was undoubtedly the case there was nothing in the statutes which had the effect of barring their claim on the moneys in Court and he therefore held that the mortgagors were not entitled to the money except upon the terms of their paying the mortgage debt with interest at 5% from the date of the mortgage.

VENDOR AND PURCHASER—SETTLEMENT—POWER OF APPOINTMENT —TRUSTEES DIRECTED TO PAY AND TRANSFER—POWER OF SALE —OUTSTANDING LEGAL ESTATE—DEDUCING TITLE.

In re Adams & Frost (1907) 1 Ch. 695, two points were involved. By a marriage settlement the trustees were empowered on the death of the husband and wife "to pay and transfer" the trust estate pursuant to the will of the survivor. The settlement also contained a power for the trustees to sell the property. The husband died and by his will appointed the property to the trustees of his will with power to them to sell. They having sold the question was raised by the purchaser whether they or the trustees of the settlement had the power to sell and Warrington, J., held that as the trustees of the settlement were "to pay and transfer" the estate to the trustees of the will, the power of sale in the settlement was superseded and the trustees of the will were now the proper persons to sell and had a right to call for the conveyance of the legal estate. The second point arose on a condition of sale which provided that every deed or instrument which should be necessary for getting in any outstanding estate or interest for completing the vendors' title should be prepared by and at the expense of the purchaser, who should also bear the expense of doing every act needed for perfecting the assurance by all parties other than the vendors. This the vendors claimed threw upon the purchaser the expense of deducing title to the legal estate, but Warrington, J., held that it did not, that the vendors were bound to deduce the title, and having done so, the condition merely required the purchaser to bear the expense of any conveyance needed for getting it in.

HIGHWAY—DEDICATION—LESSEE—USE OF LAND BY SUB-LESSEES INCONSISTENT WITH DEDICATION.

In *Corsellis* v. *London County Council* (1907) 1 Ch. 704 the neat point decided by Neville, J., is that it is not possible for a lessee of land to make an effectual dedication of any part of the

demised premises for the purposes of a highway. In this case the land in question was a strip of three feet between the highway and certain shops, and as a condition of having the roadway up to the face of the shops, the municipal authority required the lessee of the premises to agree to dedicate the three feet for a footway. No agreement in writing was made, but the pavement was laid down, but the sub-lessees of the shops thereafter were accustomed to use the three feet for placing thereon their goods and show cases. The lessor was no party to the alleged dedication, nor was a mortgage of the lessee. It was held that there had been no binding dedication of the three feet.

WILL—CONSTRUCTION—ANNUITY—DIRECTION TO PAY OUT OF INCOME.

In re Bigge, Granville v. *Moore* (1907) 1 Ch. 714, a testatrix by her will gave her residuary estate to trustees upon trust out of the income thereof to pay certain annuities and, subject thereto, to pay the income to her sister Julia. The income proved insufficiently to pay the annuities which consequently fell in arrear. A summary application was therefore made to the Court to determine first whether the annuities were a charge on the corpus, and, secondly, if not a charge whether they were a continuing charge on the income until they should be satisfied. Neville, J., answered both questions in the negative. Whether an annuity is payable exclusively out of income, or out of current income, or charged upon the corpus of the estate, or whether it is payable out of accumulated income—in other words, whether the arrears of the annuity in any one year are payable out of the income of succeeding years—in his opinion must depend upon the words of the particular will, and such an intention cannot be imputed to a testator unless the words are clear; and in the present will be found no indication of any intention to provide for the case of the current income proving insufficient to pay the annuities. Consequently so far as it was insufficient he held the annuities failed.

PRACTICE—ADMINISTRATION—CREDITORS' ACTION—LEAVE TO CREDITOR NOT A PARTY TO ATTEND PROCEEDINGS.

In re Schwabacher, Stern v. *Schwabacher* (1907) 1 Ch. 719 was a creditor's administration action, and a creditor for £10,000, whose debt had been admitted, applied for leave to attend the

proceedings at his own expense, or that the defendant's solicitors might be directed to furnish him at his own expense with a copy of the list of claims and copies of affidavits relating thereto and to give him notice of all proceedings relating to claims against the estate. Parker, J., held that the applicant had no right under the rules to what he asked, and that it was purely a matter of discretion, and there being no suggestion that the plaintiff would not do his duty in contesting claims of creditors, the application for leave to attend was refused, but without prejudice to any further application as to any particular claim the applicant might desire to dispute. As to the copies of documents required, he held that they might properly be furnished him on his paying the costs thereof.

AUCTIONEER—SALE SUBJECT TO RESERVE BID—LOT KNOCKED DOWN AT LESS THAN RESERVED PRICE—RESERVED BID.

In *McManus* v. *Fortescue* (1907) 2 K.B. 1 the plaintiff sued an auctioneer for refusal to complete a sale at auction at which the plaintiff was the highest bidder. The sale in question was advertised as being subject to a reserved price, the plaintiff's bid was the highest, and the property was knocked down to him, but on the defendant discovering that the plaintiff's bid was less than the reserved price, he refused to complete the sale. Phillimore, J., who tried the action, dismissed it on the ground that there was no legal duty on the part of the defendant to sign the memorandum of sale or otherwise complete the sale; and the Court of Appeal (Collins, M.R., and Cozens-Hardy and Moulton, L.JJ.) affirmed his decision on the ground that the sale being subject to a reserved bid the offering of the property, and the acceptance of the plaintiff's bid, and the knocking down of the property to him, were all subject to the condition that his bid should exceed the reserved price, and it not doing so, he had no ground of action.

LANDLORD AND TENANT—LEASE—FORFEITURE FOR NON-PAYMENT OF RENT—UNDER-LESSEE—TENANT—RELIEF AGAINST FORFEITURE—C.L.P. ACT, 1852 (15-16 VICT. C. 76) S. 212—(R.S.O. C. 170, S. 25).

Moore v. *Smee* (1907) 2 K.B. 8 was an action of ejectment by landlord against tenant for non-payment of rent. The action

was brought against Smee, the original lessee, and Cornish, his under lessee. Smee had not been served with the writ, but upon Cornish being served he tendered the arrears of rent and costs which was refused by the plaintiff. Cornish thereupon applied under C. L. P. Act, s. 212, (R.S.O. c. 170, s. 25) to stay the proceedings. The plaintiff resisted the application on the ground that Cornish had failed to prove his title as under lessee and Ridley, J., dismissed it; but the Court of Appeal (Cozens-Hardy and Buckley, L.JJ.) reversed his decision, being of the opinion that on such an application it is not necessary for the applicant to deduce a regular chain of title, but it is sufficient if he shews he is de facto tenant in possession.

PRACTICE—HUSBAND AND WIFE—PERMANENT ALIMONY—ORDER FOR PAYMENT OF ALIMONY—ARREARS OF ALIMONY, ACTION TO RECOVER.

Robins v. *Robins* (1907) 2 K.B. 13 seems to shew that the decision of the Divisional Court in *Aldrich* v. *Aldrich*, 24 Ont. 124, was erroneous. The action was brought to recover arrears of alimony payable under an order of the Probate and Divorce Division, and Joyce, J., held that the order sued on was not a final or conclusive judgment upon which an action of debt could be maintained, because such a judgment or order is always subject to the control of the Divorce Division, which may vary it from time to time in its discretion even as to arrears. Since *Aldrich* v. *Aldrich* was decided we may note such actions as that are expressly prohibited by 61 Vict. c. 15, s. 9 (O.).

DISCOVERY—SEDUCTION—DISCLOSURE OF NAMES.

Hooton v. *Dalby* (1907) 2 K.B. 18 was an action for seduction of the plaintiff's daughter. The defendant by his defence traversed the allegation that he was the father of the daughter's child. The plaintiff for the purpose of discovery claimed an answer to the interrogatory—whether the defendant alleged that carnal knowledge had taken place between the daughter and any other male person, and if so asking for the name and address of such person. Ridley, J. disallowed it, and the Court of Appeal (Cozens-Hardy and Buckley, L.JJ.) held that it had been properly disallowed as being a fishing interrogatory for the purpose of finding out the names of the defendant's witnesses.

SOLICITOR AND CLIENT—DELIVERY OF UNSIGNED BILLS—BILLS AGREED TO BY CLIENT—TRUSTEE IN BANKRUPTCY—TAXATION OF COSTS.

In re Van Laun (1907) 2 K.B. 23, the Court of Appeal (Cozens-Hardy, M.R. and Williams, and Buckley, L.JJ.) have affirmed the judgment of Bigham, J. (1907) 1 K.B. 155 (noted ante p. 281), to the effect, that notwithstanding a client, prior to his bankruptcy, had agreed to his solicitor's bill of costs, it is nevertheless open to the trustee in bankruptcy to go behind the agreement, and require satisfactory evidence that the debt sought to be proved is a real debt.

AUTHOR AND PUBLISHER—BANKRUPTCY OF PUBLISHER—SALE OF COPYRIGHT FOR ROYALTIES—TRUSTEE CARRYING ON BUSINESS —ROYALTIES—BREACH OF CONTRACT.

In re Richards (1907) 2 K.B. 33 was also a bankruptcy case in which the creditor, whose claim was in question, was an author who had sold to the publisher the copyright in a book, for certain royalties. The publisher having become bankrupt, the trustee continued to carry on his business, including the publication of the book in question. The author claimed that he should be paid in full the royalties which were payable in respect of the publication by the trustee, but Bigham, J., held that he was not so entitled, but that his rights were limited to proving a claim for damages sustained by breach of the contract.

FACTOR—MERCANTILE AGENT—AUTHORITY TO PLEDGE—FACTORS ACT, 1889 (52-53 VICT. C. 45) SS. 1, 2—(R.S.O. C. 150, S. 2) —GOODS OBTAINED BY FRAUD.

Oppenheimer v. *Frazer* (1907) 2 K.B. 50 is an appeal from the decision of Channell, J. (1907) 1 K.B. 579, which will be found noted ante p. 397. In this case a mercantile agent had obtained possession of goods by a trick and had delivered them to one Broadhurst to sell for him. Broadhurst, who, notwithstanding he had ground for suspecting the agent had improperly obtained possession, had then sold them to a firm who purchased them in good faith on the joint account of themselves and Broadhurst, with whom they divided the profits made on a re-sale. In these circumstances Bigham, J., held that the firm had acquired a good title, but the Court of Appeal (Barnes, P.P.D., and Moul-

ton, and Kennedy, L.JJ.) held that, their purchase being on joint account of themselves and Broadhurst, they were affected by the bad faith of Broadhurst, and that the Factors Act (52-53 Vict. c. 45), (R.S.O. c. 50), was consequently no protection to them.

ADULTERATION—SALE OF FOOD AND DRUGS ACT, 1875 (38-39 VICT. C. 63) S. 25—(R.S.C. C. 133, S. 33)—WANT OF KNOWLEDGE—MILK—WARRANTY—FUTURE SALES—WARRANTY IN WRITING.

Evans v. *Weatheritt* (1907) 2 K.B. 80 was a prosecution for selling milk from which 28 per cent. of the milk fat had been abstracted. The defendant set up want of knowledge, and purchase by him of the milk in question with a warranty of its purity. It was proved that by a contract in writing the defendant had agreed to purchase from a company the whole of the milk required for his dairy for twelve months from 1 October, 1905, and the contract contained a warranty by the vendors that all milk delivered should be pure. In June, 1906, milk was delivered by the vendors to the defendant under the contract accompanied by a delivery note which did not refer to the contract. Some of this milk was sold and was proved on analysis to have had 28 per cent. of milk fat abstracted from it. The defendant relied on the warranty, and 38 & 39 Vict. c. 63, s. 25 (R.S.C. c. 133, s. 33), and the Divisional Court (Lord Alverstone, C.J., and Darling and Lawrence, JJ.), held that the defence was made out; and the conviction which was based on the ground that there was nothing to connect the warranty with the particular consignment of goods in question, was quashed.

PRACTICE—SECURITY FOR COSTS—INHERENT JURISDICTION OF COURTS.

Billington v. *Billington* (1907) 2 K.B. 106 was an action which had been tried before an official referee, and judgment recovered in favour of the plaintiff. The defendant had become bankrupt, and he subsequently gave notice of appeal from the judgment; the plaintiff thereupon applied to the Divisional Court for an order requiring the defendant to give security for the costs of the appeal. The Divisional Court (Lord Alverstone, C.J., and Darling and Phillimore, JJ.) held that there was an inherent jurisdiction in the Court to order security to be given, and that it was proper to grant the application in the present case.

LANDLORD AND TENANT—LIABILITY OF LANDLORD TO THIRD PARTY FOR INJURY—LANDLORD UNDER NO CONTRACTUAL LIABILITY TO REPAIR—REPAIRS IN FACT MADE BY LANDLORD—NEGLIGENCE IN EXECUTING REPAIRS—NUISANCE.

In *Malone* v. *Laskey* (1907) 2 K.B. 141 the action was brought to recover damages for injuries sustained by the plaintiff in the following circumstances. The defendants were the owners of certain house property, part of which they let to Whitherby & Co., who sub-let a portion to the Script Shorthand Co., of which company the plaintiff's husband was manager. In that capacity he resided with his wife (the plaintiff) on the premises of the Script Shorthand Co. On adjoining premises also belonging to the defendant, they had a steam engine for the purpose of generating electricity which caused considerable vibration in the Script Shorthand Co.'s premises. The result of the vibration was to render a water tank in a lavatory on these premises insecure. The defendants were under no contractual obligation to repair, but on the matter being brought to their attention they sent men to remedy the defect, and for that purpose they placed an iron bracket under the tank. Three months afterwards the bracket fell on, and seriously injured the plaintiff. The jury found that the bracket had been negligently placed and its fall was caused by the vibration arising from the working of the engine on the adjoining premises which the jury found was a nuisance. The plaintiff sued for damages (1) for nuisance, and (2) for injuries occasioned by the falling of the bracket. The action was tried by Darling, J., who on the findings of the jury that the damage was caused by the vibration which amounted to a nuisance, and that the bracket was negligently put up—gave judgment for the plaintiff. The Court of Appeal (Barnes, P.P.D., and Moulton and Kennedy, L.JJ.) reversed his decision, on the ground that the plaintiff having no estate or interest in the premises where she lived was not entitled to complain of the nuisance; and that the defendants being under no contractual liability to the plaintiff to repair the premises in question, and owing no duty to the plaintiff, she had no right of action against them for the injury she had sustained through their negligence in putting up the bracket. The trap cases on which the plaintiff relied were held inapplicable because there was no invitation by the defendants to the plaintiff to use the premises.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J.O.] [March 4.

COPELAND-CHATTERSON COMPANY *v.* BUSINESS SYSTEMS, LIMITED.

Appeal—Stay of execution of injunction—Disobedience of injunction—Contempt of Court—Stay upon terms.

The rule that a party to an action guilty of contempt can take no step, is subject to several exceptions, and one of these is that the party is entitled to prosecute an appeal from the order or judgment which it is alleged he has been guilty of disobeying.

Upon an application by the defendants to a judge of the Court of Appeal, under Con. Rule 827 (1) (d), for an order staying the execution of an injunction awarded by a judgment of the High Court, pending an appeal from that judgment to the Court of Appeal, where it is alleged that the defendants are in contempt for disobedience of the judgment, but they have not been so adjudged, the judge will not determine whether a contempt has been committed.

Where the defendants were appealing in good faith, execution of the injunction was stayed, upon terms, pending the disposition of the appeal.

W. H. Irving, for defendants. *W. E. Raney*, for plaintiffs.

Full Court.] [March 14.

WALLINGFORD *v.* OTTAWA ELECTRIC RY. CO.

Street railways—Injury to passenger alighting from car—Contributory negligence—Crossing behind car—Duty to sound gong—Regulations—"Crossing"—Case for jury—Costs——Discretion—Appeal.

The plaintiff was a passenger on a car of the defendants, and stepped from it while it was in motion, as it reached a street

crossing; the motorman had been signalled to stop, but failed to do so. The plaintiff alighted safely, but found himself in front of a horse and cab driven swiftly towards him. In order to avoid a collision with the horse, and also in order to cross to the west side of the street, the plaintiff turned behind the car he had just left and passed on towards the other track; as he reached it, he became aware of a car coming towards him at a rapid rate, and to avoid being run down he flung himself on the fender, thus saving his life, but he was seriously injured. In an action to recover damages for his injuries he was a witness at the trial, and said that it was impossible to get out of the way of the car; he did not hear the gong sound, although if it had been rung he would have heard it. By one of the regulations forming part of the agreement between the city corporation and the defendants, validated by 57 Vict. c. 76 (O.), under which the defendants operated their cars on the city's highways, it was provided that each car was to be supplied with a gong, to be sounded by the driver when the car approached to within 50 feet of each crossing. This was not brought to the attention of the judge at the trial. The plaintiff, however, was aware that it was the usual practice to sound the gong at crossings and he expected it to be done when a car was approaching a crossing.

Held, that, even if the regulation had not the force of a statutory requirement, the proof of failure to comply with a precaution which the defendants had recognized as important for the safety of persons using the crossing on streets occupied by the railway, was evidence for the jury of negligence in the conduct of the car; and the question whether the gong was sounded was for the jury.

Semble, per Moss, C.J.O., that the term "crossing" in the agreement, is intended to indicate any place on or along the streets occupied by the railway where there is a walk laid for the purpose of enabling foot passengers to cross from one side of the street to another, and where the cars would stop to take up or let down passengers; and is not confined to the crossing of an intersecting street.

The Court declined to interfere with the direction of the Court below in withholding costs from the plaintiff, in setting aside a nonsuit and granting a new trial.

Order of a Divisional Court affirmed.

H. S. Osler, K.C., for defendants, appellants. *J. A. Ritchie,* for plaintiff.

Full Court.] JONES *v.* MORTON CO. [March 14.

Master and servant—Injury to servant—Employment of child under fourteen—Lease of part of building as factory—Use of elevator—Defective condition—Liability of owners of building—Implied invitation—Liability of employers—Common law—Workmen's Compensation Act—Factories Act—Jury.

The plaintiff, a child under fourteen years of age, was injured by the fall of a goods elevator used by his employers in a building, the third floor of which they rented for the purpose of their business of manufacturing check books. By the lease to the employers, the lessors covenanted to give the use, together with other tenants in the building, to the lessees (the employers), their agents, clerks and tenants, of the elevator in said building for freight purposes only, in each day, and to keep the same in repair and good working order, with a right of way to and from the elevator, and provided that the lessors should not be liable for any damage or any accident to any member of said lessees or any of their employees through using or interfering with the elevator, but the lessors were to keep the elevator in proper running order, and repair on notice. The plaintiff was "helper" to I., a fellow employee, who told him to bring up a packing case from the basement; the plaintiff placed it on the elevator, which stuck on the way up; he returned to I. and reported, and I. told him to take the case off, and not to use that hoist, but another. The plaintiff went down the stairs, and I. heard nothing more of him until he was found lying on the elevator, injured. The evidence did not shew whether the packing case was on or off the elevator when the plaintiff was found. The elevator was out of order, and the inference was that it had fallen.

Held, 1. The plaintiff's rights as against the lessors wholly depended upon implied invitation, and any invitation to use the elevator must be regarded as cancelled when the plaintiff became aware that it was out of order and was told not to use it; and the plaintiff's action against the lessors to recover damages for his injuries failed.

2. The plaintiff's action against his employers also failed, so far as it was based upon the common law and the Workmen's Compensation for Injuries Act; upon the former, because, upon the undisputed evidence, he was not using the defective elevator as an elevator at the time of his injury, or, if he was, that he

was doing so in defiance of the order of I.; and upon the latter, because the jury had not made the necessary findings upon which to base a judgment in respect of the order given by I. But, by the Ontario Factories Act, R.S.O. 1897, c. 256, s. 3, the plaintiff's employment was wholly unlawful, and a primâ facie case under that Act was made simply by proof of his age, the employment, and the injury. To such primâ facie case no answer was made; there was no finding of contributory negligence; and the employers' premises were, within the meaning of the Act, a factory, of which the elevator formed part. The employers were, therefore, liable under the Factories Act to the extent of $1,500.

MEREDITH, J.A., dissented in part.

Judgment of ANGLIN, J., varied.

Hellmuth, K.C., and *Greer*, for appellants. *DuVernet* and *Knox*, for appellants. *Masten* and *J. H. Spence*, for plaintiffs.

HIGH COURT OF JUSTICE.

Mabee, J.] [March 8.

RE CLEARY AND TOWNSHIP OF NEPEAN.

Municipal corporations—Local option by-law—Adoption by electors—Three-fifths majority—Computation—Rejected or uncounted ballots—Illegal votes—Finding of Voters' Lists—Effect on by-law.

In computing the three-fifths majority of voters required for a local option by-law by 6 Edw. VII. c. 47, s. 24, s.-s. 4 (O.), rejected or uncounted ballots are not to be considered.

Upon a motion to quash such a by-law the applicant may go behind the voters' lists and shew that illegal votes were cast; if he succeeds in shewing that, the illegal votes must be deducted from those favourable to the by-law; and if the result be that the majority is not sufficient, the by-law will be quashed.

Re Gerow and Township of Pickering (1906) 12 O.L.R. 545, and *Re Sinclair and Town of Owen Sound* (1906) ib. 488 followed.

Gordon Henderson and *D. H. McLean*, for applicant. *W. Greene*, for respondents.

Teetzel, J.] [April 2.

RE ROBERTSON AND GRAND TRUNK RY. CO.

Mandamus—Carriage of passengers—Rates and accommodation —Jurisdiction of Board of Railway Commissioners.

Two questions must be found in favour of the applicant before the writ of prerogative mandamus can issue; first, has the applicant a specific legal right to the performance of some duty by the respondent; and second, will the applicant without the benefit of the writ be left without effectual remedy?

Where the applicant sought a mandamus to compel the Grand Trunk Railway Company, pursuant to sec. 3 of their Act of incorporation, 16 Vict. c. 27 (C.), to run a train containing third-class carriages, and to permit the applicant to travel therein on payment of a fare not exceeding one penny a mile:—

Held, that the applicant had an adequate remedy under the provisions of the Dominion Railway Act, 1903, (ss. 8, 23, 25, 44, 214, 294, being specially referred to), and that that remedy could be more conveniently applied and executed under the direction and supervision of the Board of Railway Commissioners than by the Court; and the application was refused.

J. W. Curry, K.C., for applicant. *Wallace Nesbitt*, K.C., for respondents.

Falconbridge, C.J. K.B.] [April 3.

REX EX REL. ARMSTRONG *v.* GARRATT.

Municipal elections—Declaration of qualification to be filed by candidate after nomination—Declaration made before election—Duty of clerk of municipality—Objection taken after election—Irregularity not affecting result—Municipal Act, 1903, *ss.* 129(3*a*), 204.

The declaration of qualification required by s. 129(3*a*) of the Municipal Act, 1903, to be filed by a candidate for municipal office in certain cities, within (at the most) 48 hours after the hour of nomination, may be made and subscribed before the nomination. If the declaration tendered on behalf of a candidate be made after the final revision of the assessment roll, upon which the candidate must be qualified, if it avers the

possession of the necessary qualification, specifying the property, and if such averment be corroborated by the last revised assessment roll, the city clerk should file the declaration and place the candidate's name on the ballot paper, even if, as in this case, the declaration was made and subscribed 6 weeks before the nomination.

Semble, that, even if the declaration may not be made before the nomination, the objection cannot be taken after the election, and the declaration in this case having been made in good faith, as a compliance with s. 129(3*a*), and acted upon in good faith by the city clerk, there was at the worst an irregularity not affecting the result of the election: s. 204 of the Municipal Act, 1903.

Decision of MacBeth, Co. J., of Middlesex, affirmed.

Gibbons, for the relator. *DuVernet*, for defendant.

Boyd, C., Magee, J., Mabee, J.] [April 5.

BRADD *v.* WHITNEY.

Negligence—Death of person operating calcium light in theatre —Employment by playing company—Liability of owners—Partnership.

A theatrical company agreed to present a certain play at the defendants' theatre on a date specified, and the defendants agreed to furnish the theatre and all the properties contained in the theatre for the period of the engagement, and also to "furnish electric current for the company's calciums." It was agreed that there should be no other entertainment in the theatre during the engagement, and that the gross receipts should be shared so that 70 per cent. should go to the playing company. The plaintiff's son was employed by the company to operate and did operate a calcium light; he was under the charge and direction of their electrician; the company's servants had entire and sole control of the stage and its surroundings, including the place where the lamp was operated. The lamp was the property of the company. The plaintiff's son was killed by the action of electricity while operating the lamp:—

Held, that the effect of sharing the gross receipts was but another mode of paying rent for the premises, and did not in-

dicate that any partnership existed; and the defendants, having no right of control, were not jointly liable with the company, nor in any way liable, for the death of the plaintiff's son.

Lyon v. *Knowles* (1863), 3 B. & S. 556, 560 followed.

Flynn v. *Toronto Industrial Exhibition Association* (1905), 9 O.L.R. 582, and *Inder maur* v. *Dames* (1866-7), L.R. 1 C.P. 274, L.R. 2 C.P. 311, distinguished.

J. L. Counsell, for defendants. *J. W. Nesbitt,* K.C., for plaintiffs.

Riddell, J.] REX *v.* COLAHAN. [April 6.

Criminal law—Habeas corpus—Imprisonment in default of payment of fine and costs—Tender to deputy keeper of gaol—Reasonable time—Rule of prison as to hour of receipt of fine—Effect of—Discharge of prisoner.

A warrant of commitment commanded the keeper of a common gaol to receive the defendant into his custody in the common gaol, there to imprison him for 30 days unless the amount of a fine and costs were sooner paid to the keeper. The defendant was apprehended under this warrant and received by the gaoler on the 12th March. His agent, on the 14th March, at 10 minutes before 8 o'clock in the afternoon, tendered the proper amount of the fine and costs to the person in charge, the deputy keeper, who refused to receive the money, on the ground that there was a rule of the gaol that no person would or could be released, on payment of his fine after 5 o'clock in the forenoon, until the next morning:—

Held, that there was no power, statutory or common law, to make such a rule, and that the tender having been made at a reasonable time and to the proper person, the prisoner should have been released; and having been improperly detained after the tender, he was entitled to be discharged upon habeas corpus.

J. B. Mackenzie, for defendant. *T. L. Monahan,* for Crown.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [May 7.

RE RICKEY AND TOWNSHIP OF MARLBOROUGH.

Municipal Act—By-law—Publication—"Three successive weeks"—Non-compliance—Incurable as irregularity.

The publication of a proposed by-law in a paper "each week

for three successive weeks" required by sub-sec. 2 of sec. 338, of the Consolidated Municipal Act, 1903, is a publication once in each three successive periods of seven days, and

Where a by-law was published in a semi-weekly paper on Friday, the 14th, Tuesday, the 18th, and Tuesday, the 25th, of a certain month.

Held, that there had been two publications in the first week or seven day period, one in the second and none in the third, and that the statute had not been complied with.

Held, also that non-compliance with the provisions of sec. 338 could not be treated as a mere irregularity curable under sec. 204.

Cartwright v. *Town of Napanee,* 9 O.L.R. 69, at p. 71, followed.

F. B. Proctor, for the appeal. *J. T. White,* contra.

Mabee, J.] McCARTER *v.* YORK COUNTY LOAN CO. [June 6.

Lessor and lessee—Option in lease—Winding-up of lessor company—Liquidator—Sale by—Disregard of option—Damages.

The defendants leased a house property to the plaintiff by lease in writing containing a clause "Provided that if the lessors obtain during the said term an offer to purchase the said premises, before accepting the same the lessee shall be given the option of purchasing on same terms as on said offer." Subsequently an order for the winding-up of the company was made and a liquidator was appointed who sold the premises without giving the plaintiff an opportunity to exercise his option.

Held, that the winding-up order did not in any way cut down the rights of the plaintiff or change his position: that the liquidator was authorized to sell the premises, but only subject to the terms and conditions of the lease; that he was bound to submit to the plaintiff, who had not waived his rights, the offer received, and not having done so the company was liable in damages notwithstanding that the plaintiff was aware that the liquidator was making efforts to sell the premises and notwithstanding that the sale was made with the knowledge and consent and induced by the conduct of his wife which latter he denied any knowledge of.

Shilton, for plaintiff. *Johnston,* K.C., for defendant.

Riddell, J.] MARRIOTT *v.* BRENNAN. [June 6.

Contract to sell land—Agents commission.

The defendant employed the plaintiffs, real estate agents, to sell certain property at a certain price, agreeing to pay a commission to the one who procured a purchaser able and willing to pay the price, and submitted a written offer. On receipt of the offer, defendant, making no objection to it, said he wanted to look into the matter and used the offer as a lever to close a pending offer of his own to another party at the same price in order to save the commission.

Held, that plaintiffs had done all they were called upon to do when they obtained a purchaser ready and willing to purchase, and that they were entitled to their commission.

Gibbald v. *Bethlehem Iron Co.* (1881) 83 N.Y. 383 referred to.

Code, for plaintiffs. *Daly,* for defendant.

Riddell, J.] [June 6.

SOVEREIGN BANK *v.* INTERNATIONAL PORTLAND CEMENT CO.

Assignment to bank of moneys under a contract to secure advances—Subsequent judgment creditors of assignors—Equitable assignment—Notice.

A firm of contractors having a contract with a town desiring advances from a bank assigned "all or any money or moneys due or which may become due from the corporation of the town," and thereafter the cheques for all moneys coming to the contractors payable to their order were handed to the bank. The contractors executed an assignment as follows: "We hereby for and in consideration of advances heretofore made . . . assign, transfer and make over to (the same bank, another branch) as a general and continuing collateral security balance of the account against (the town) now assigned to (the bank)." The managers of both branches knew that there was but one contract upon which the contractors would be entitled to receive money from the town and admitted

that the assignments were simply taken as security for the advances made or to be made to the contractors. On an interpleader issue between the bank and subsequent judgment creditors of the contractors,

Held, that the assignments to the bank were good equitable assignments: that no notice of them to the town was necessary: and that a sum of money, part of moneys due by the town to the contractors, paid into the hands of the sheriff under s. 37 of the Creditors Relief Act, under a garnishing order obtained by the judgment creditors as well as any money to be so paid in, was the money of the bank.

Ritchie and *Foy,* for the bank. *Orde,* for company.

Riddell, J.] REX *v.* ROBINSON. [July 3.

Habeas corpus—Issue of two writs—Regularity of second—Prisoner allowed to give recognizance and go free after sentence—Arrest later—Time of commencement of sentence—Expiry—Escape—Release—Protective orders—Terms.

The prisoner was convicted of an offence on the 17th of January and sentenced to four months imprisonment, but instead of being imprisoned his recognizance was taken by the magistrate to appear when called upon and he was allowed to go free. On the 27th of March without any notice a warrant was issued and he was arrested and put in gaol. A writ of habeas corpus was granted and a motion for his discharge made on the 26th of April and refused, the papers being on their face regular; but leave was reserved to move for a new writ on the expiry of four months from the day of sentence. A new writ was granted on the 25th of June and motion made for his discharge on the 27th June.

Held, that there was a right to issue the second writ, the former one being premature and there having been no adjudication upon the matter; but that it should not issue upon any ground which could have been taken on the former.

Taylor v. *Scott* (1898) 30 A.R. 475 distinguished.

Held, also, that the term of imprisonment began on the day of passing sentence; that the full term had expired; that the magistrate had no power to take the recognizance; that the pris-

oner had not been guilty of an escape; that he was not "at large . . . without some lawful cause" and an order was made for his release.

Order for protection of magistrate made on terms.

J. B. Mackenzie, for the motion. *Cartwright,* K.C., Dep. Atty.-Gen., contra.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] [May 21.

FARRELL *v.* PORTLAND ROLLING MILLS COMPANY, LIMITED.

Company—Prospectus—Misrepresentation—Agent—Liability of directors—Rescission of contract to purchase shares—Delay —Competency of witness—Religious belief.

Where a broker employed by a company to sell shares in its capital stock, issues, though without the knowledge or authority of the company, a prospectus containing untrue material statements, on the strength of which shares are purchased, the purchase money being paid to the company, the purchaser may rescind the contract as against the company, the broker's statements being binding on his principal as made within the scope and course of his employment.

A broker employed by a company to sell shares in its capital stock, issued a prospectus stating, among other things, that while in the past the company's earnings had been applied to the improvement of its property, "henceforth it is the intention to declare regular half-yearly dividends as the net earnings of the business will warrant. In view of past results, and the very favourable prospects for increased earnings, shareholders can with confidence look forward to receiving satisfactory returns on their investments in the shape of dividends." No mention was made of the debts or assets of the company. It owed a large

sum to its bankers, but its assets considerably exceeded its liabilities:—

Held, that the statement amounting to no more than an announcement of policy, and which the directors were at liberty to pursue, a company having power, though in debt, to pay dividends out of profits, the failure to disclose the indebtedness to the bankers did not render the statement misleading, there also being no duty to disclose in the prospectus the assets and liabilities of the company.

Directors adopting a resolution to sell shares in the capital stock of the company and to employ a broker for the purpose held not responsible in damages for misrepresentation in a prospectus issued by a broker employed by them under the resolution, at the instance of a purchaser of shares who had purchased in reliance upon the prospectus, the prospectus having been issued without their knowledge or authority, and the broker being the agent of the company.

The plaintiff learned on January 24, 1904, that material representations, upon which he had been induced to purchase shares in the defendant company on June 24, 1903, were untrue. On February 16, and on March 8, he demanded at meetings of the company a return of the purchase money. Neither demand was assented to, and on April 13, the company communicated to him a formal refusal. A suit for rescission was commenced by him on December 27, following:—

Held, that the suit was barred by delay.

Where a person stated he believed in a Supreme Power—a God as defined by Christ's teachings; in heaven and hell, and in a future state of rewards and punishments, but, that he did not believe he was under any greater obligation to tell the truth by reason of taking the oath and that he did not believe that a person who swears falsely will be punished in the hereafter, it was held that he was competent to be sworn as a witness.

McInerney, K.C., and *Price,* for plaintiff. *Teed,* K.C., and *A. H. Hanington,* K.C., for defendants.

Barker, J.] TOOKE BROTHERS *v.* BROCK & PATTERSON. [May 31.

Debtor and creditor—Bill of sale—Agreement to give—Postponement of execution—Insolvency—Assignments and Preferences Act—Creditors—Amendment of parties.

A trader when in insolvent circumstances to the knowledge of

himself and the defendants executed to them a bill of sale of his stock in trade pursuant to an agreement made with them nearly four years previously to give it whenever required, they advancing to him upon the faith of the agreement a sum of money for use in his business and giving him a line of credit. Shortly after executing the bill of sale he made an assignment for the benefit of his creditors under c. 141, C. S. 1903:—

Held, 1. In a suit by the assignee, that the giving and filing of the bill of sale having been postponed until the debtor's insolvency in order to prevent the destruction of his credit, the agreement was a fraud upon other creditors, and that the bill of sale should be set aside.

2. Delivery of the stock in trade by the trade to the defendants subsequently to the execution of the bill of sale, did not assist their title, s. 2 of c. 141, C.S. 1903, applying.

A preferential transaction falling within the provisions of c. 141, C. S. 1903, may be impeached at the instance of creditors, where the debtor has not made an assignment.

Where after the commencement of a suit by creditors to set aside a bill of sale, as constituting a fraudulent preference under c. 141, C.S. 1903, the grantor made an assignment for the benefit of his creditors, the assignee was added as a plaintiff.

Teed, K.C., and *Tilley*, for plaintiffs. *Earle*, K.C., and *Kelley*, for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] DEAN *v.* LEHBERG. [June 9.

Executors and administrators—Remedy against estate for work done for administrator.

The plaintiff's claim was for work and services performed at the request of the defendant on a farm belonging to the estate of Ada Louise Lehberg, deceased, of which her husband, the defendant, had taken out letters of administration. The services were all performed after the death of Mrs. Lehberg; but her

estate had the benefit and the plaintiff sued the defendant as administrator of her estate.

Held, on appeal from the verdict of the County Court judge in plaintiff's favour, that the plaintiff could not recover against the defendant in his representative capacity, and could only have judgment for the value of his services against defendant in his personal capacity.

Farhall v. *Farhall*, L.R. 7 Ch. 123 followed.

Costs of the action and appeal awarded to defendant to be set off against the judgment.

Turnbull, for plaintiff. *Conde*, for defendant.

Full Court.] [June 10.

SMITH *v.* AMERICAN ABELL ENGINE CO.

Conditional sales—Lien Notes Act, R.S.M., 1902, *c.* 99, *ss.* 4, 7—*Charge on land created by document separate from order for chattel—Caveat.*

Appeal from decision of MACDONALD, J., noted ante, p. 297, dismissed with costs.

Aikins, K.C., and *Fullerton*, for plaintiff. *A. B. Hudson*, for defendants.

KING'S BENCH.

Mathers, J.] DANIELS *v.* DICKSON. [May 2.

Practice—Adding third party—Rules 245-250*—Indorsee of promissory note against maker—Defence that payee guilty of fraud—Maker not entitled to bring in payee for the purpose of getting relief over.*

Action on a promissory note made by defendants to one Helgeson and by him indorsed to the plaintiff. The main defence was that Helgeson obtained the note by fraud and that the plaintiff was not a holder in due course. The defendants served Helgeson with a third party notice under Rule 246 of the King's Bench Act, when Helgeson moved to set the notice aside. The defendants then applied under Rule 245 for an order "joining

Helgeson as a party to the action." The two motions were argued together before Cumberland, Co. J., local judge at Brandon, who held that the third party notice provided for in Rules 245 and 246 is wholly inapplicable in such a case, being intended for use when the third party may be supposed to have some ground which he may be able to urge against the plaintiff's right to recover from the defendants, the object of giving the notice being that if he fails to come in and urge such ground it will not be open to him afterwards, when the defendant seeks indemnity or contribution or other relief over against him, to say that the plaintiff should not have been permitted to get his judgment against the defendant.

In the usual case the plaintiff is asserting something against the defendant and the latter is denying it. If the plaintiff succeeds, the defendant proposes to ask the third party for relief over, so he says to the third party: "Come in and help me fight this issue and be bound by the result."

Here the defendants are not asking the third party to come in and help them to contest any point.

If the defendants prove that the plaintiff is not a holder in due course, they will succeed in the action and will require no relief over against Helgeson; but, if the plaintiff is a holder in due course, he is entitled to judgment and should not be delayed in recovering it by what might be prolonged litigation between the defendants and Helgeson: *Bower* v. *Hartley*, 1 Q.B.D. 656, and King's Bench Act, Rule 250.

Helgeson's motion granted and that of the defendants refused with costs.

Held, on appeal that the discretion exercised by the local judge in making the orders should not be interfered with and that the appeal should be dismissed with costs.

Burbidge, for plaintiff. *Hough*, K.C., for defendants. *Pitblado*, for Helgeson.

Mathers, J.] SMITH *v.* VAN BUREN. [May 13.

Garnishment—Liability of purchaser of land after assignment of agreement to third party—Order as to payments still to fall due—King's Bench Act, Rule 764.

Before the commencement of this action the defendant had sold certain lands to one McInnes under an agreement whereby

McInnes convenanted to pay the balance of the purchase money in certain instalments none of which were due at the time of the service of a garnishing order in this action upon McInnes. This was a motion made after the due date of one of the instalments for an order for the garnishee to pay it over to the plaintiff who had in the meantime recovered judgment.

Held, 1. That the garnishee order covered the instalments although none of them were due and payable at the time of the service of it.

2. That a subsequent sale of his interest in the land by the garnishee to a third party, under an agreement, whereby this party assumed liability to the defendant for the remaining unpaid instalments, made no difference and could not deprive the plaintiff of his rights under his order.

3. The plaintiff was entitled, under Rule 764 of the ing's Bench Act, to an order for payment not only of the overdue instalment but also, when due, of those still to fall due until his judgment should be satisfied.

Fullerton, for plaintiff. *McPherson,* for garnishee.

Mathers, J.] [May 20.

LEVI *v.* PHŒNIX INSURANCE CO.

Practice—Joinder of defendants—Suit against two companies insuring same property—King's Bench Act, Rule 219.

Held, that Rule 219 of the King's Bench Act, R.S.M. 1902, c. 40, does not permit a plaintiff to proceed in one action against two separate insurance companies upon separate policies of insurance, although they cover the same goods destroyed by the same fire.

Foulds v. *Foulds,* 17 P. R. 480; *Hinds* v. *Barrie,* 6 O.L.R. 656, and *Andrews* v. *Forsythe,* 7 O.L.R. 188, followed.

Plaintiff was required to elect within five days which company she would proceed against in this action and to discontinue as against the other.

Burbidge, for plaintiff. *Anderson,* for Phœnix Ins. Co. *Stackpoole,* for Rochester German Ins. Co.

Phippen, J.A.] KING *v.* GAGE. [May 21.

Conspiracy in restraint of trade—Criminal combination—Criminal Code, s. 498—Grain Exchange, Rules and Regulations.

The defendants were indicted under sec. 498 of Crim. Code for conspiring and combining to restrain or injure trade or commerce in relation to wheat.

Held, 1. Notwithstanding the absence of the word "unduly" from sub-section (*b*) of that section and its presence in the other three sub-sections, it is only such combinations as unduly restrain or injure trade or commerce that are punishable criminally, and sub-section (*b*) relates only to those restraints which are not justified by any personal interest of the contracting parties, but which are mere malicious restraints unconnected with any business relations of the accused. *Gibbons* v. *Metcalfe*, 15 M.R. 583 followed.

2. None of the by-laws, rules and regulations following, although more or less in restraint of the trade in wheat, can be said to be undue restraints so as to render the parties criminally responsible. (*a*) A by-law providing that no member of the Exchange should pay a greater price for wheat than would allow a profit of one cent per bushel on selling to the miller or exporter. (*b*) An amendment of above by-law providing that no member should employ a buying agent at a country point when the business done would not justify paying the agent a salary of at least $50 per month. The object and purpose of this rule was to save expenses and loss of commissions to the members, and not to lessen the prices paid to the farmers, and such prices were not thereby in any way diminished. (*c*) An agreement that offers would not be made to buy wheat at country points during the market hours on the Exchange (9.30 a.m. to 1.15 p.m.), but that the closing prices should be immediately telegraphed to all points, on which basis track wheat might be bought at those points until the opening of the market on the following day. To avoid the expense of multiplying messages and to insure the prompt receipt of market quotations at country points, a member of the Exchange was employed to wire the prices at the close of the market. There was no doubt that this had been fairly done and that the prices wired were not only just, but were the highest that could then be paid for grain based on Fort William values. The farmer had other ways of selling his wheat even during market hours, and the agreement was no undue

restraint upon the freedom of trade in grain. (*d*) An agreement to make an average difference or spread of three cents and the fraction (whatever that might be) per bushel between the prices paid for track and street wheat. It was shewn that the average actual cost of maintaining the elevators was a little over three cents per bushel on the average wheat handled. (*e*) An agreement amongst the elevator companies that during a portion of each year towards the close of navigation, they would not have more than 5,000 bushels of purchased wheat in any one interior building at any one time. The reason for this was that owing to traffic conditions it was doubtful when street wheat could be actually sent forward on the cars. To be compelled to carry it until the following season, if bought on the basis of going forward during the purchasing season, meant a considerable loss. (*f*) That some of the elevator companies pooled receipts at certain points for a couple of seasons. From a variety of causes, many railway stations were left with too great elevator capacity, and the companies found it necessary either to cut down expenses or increase the elevator charges. The pooling was adopted because it reduced the expenses, and the public was not affected by the arrangement, nor were prices paid for grain thereby lessened.

On the whole case the learned judge came to the conclusion that the acts complained of, taken in connection with their surrounding conditions, made on the whole for a more stable market at the fullest values than if totally unregulated competition had prevailed, and so were for the public good. Defendants acquitted.

Bonnar, O'Connor & Blackwood, for the Crown. *Aikins*, K.C., and *Robinson*, for McHugh and Love. *A. J. Andrews* and *Burbidge*, for Gage.

Macdonald, J.] DYCK *v.* GRAENING. [June 4.

Chattel mortgage—Affidavit of bonâ fides—Jurat—Meaning of "sworn."

Plaintiff claimed damages for the seizure by defendants of a team of mules under a chattel mortgage which he contended was invalid by reason of the objections indicated by the following holdings of the trial judge.

Held, 1. The affidavit of bonâ fides on a chattel mortgage is sufficient, although it purports to be the joint affidavit of two

mortgagees and the jurat does not shew that they were severally sworn: *Moyer* v. *Davidson*, 7 U.C.C.P. 521.

2. The insertion in the affidavit of a clause reading "That I am the duly authorized agent of the mortgagee" was an apparent mistake and did not vitiate it.

3. The fact that it was stated in the jurat that the affidavit had been "sworn," whereas the deponents had affirmed, was not a fatal objection, as by the Interpretation Act the expressions "swear" and "sworn" respectively include "affirm solemnly" and "affirmed solemnly."

4. The Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, s. 5, does not require that the occupation of the mortgagee should be stated in he affidavit of bonâ fides.

Brodie v. *Ruttan*, 16 U.C.R. 207 followed.

Action dismissed with costs.

Lemon, for plaintiff. *Bowen*, for defendants.

Province of British Columbia.

SUPREME COURT.

Hunter, C.J.] [May 28.

WILLIAMS *v.* CANADIAN BANK OF COMMERCE.

Banks and banking—Interest—Agreement to pay more than statutory rate.

Section 80 of the Bank Act does not prevent a bank from entering into a contract to be paid a higher rate of interest than seven per cent., and if, under such a contract, interest is paid in excess of such a rate, it cannot be recovered back. *Massue* v. *Dansereau* (1865) 10 L.C.J. 179 followed.

Donaghy, for plaintiff. *Davis*, K.C., for defendant bank.

Hunter, C.J.] [May 28.

DE LAVAL SEPARATOR COMPANY *v.* WALWORTH.

Company—Statute—Construction of—Contract with extra-provincial company—Jurisdiction.

The failure of an extra-provincial company to register in

accordance with the provisions of the Companies Act, 1897, does not avoid contracts entered into within the jurisdiction, although it penalizes the carrying on of business by such non-registered companies.

Semble. The forwarding of goods to an agent, to be sold by him in his own name, is not a transaction within the prohibition of section 123.

Quære, whether the creating within the jurisdiction of an obligation which is to be performed without the jurisdiction is carrying on business within the jurisdiction.

Davis, K.C., and *Marshall,* for plaintiff company. *Craig,* for defendant.

Book Reviews.

The Principle of German Civil Law, by ERNEST J. SCHUSTER, LL.D., of Lincolns Inn, Barrister-at-law. Oxford at the Clarendon Press. London and New York, Henry Frowde, and Stevents & Sons, Limited, London. 1907. 684 pages. Price, $3.50.

The preface says, "This book is intended (1) to assist the study of English law from a comparative point of view; (2) to give an insight into the latest and most perfect attempt to systematize the whole of the private law of a country; (3) to give some practical help to the increasing number of practitioners who in the course of their daily work have to deal with questions of foreign and private international law. The drafting of the German civil code was started in 1874, and came into force January 1, 1900, accompanied by various explanatory statutes. The expansion of international commercial dealings and frequent changes of domicil in these days largely increases the number of the occasions in which lawyers have to deal with foreign law, hence the advantage of such a work as that before us, especially when the writer has endeavoured and apparently largely succeeded in clothing the information given with an English dress. It goes without saying that the knowledge of German law must be of much interest to those of the Anglo-Saxon race, their parentage being so largely the same.

A Treatise on the Law, Privileges, Proceedings and Usage of Parliament, by SIR THOMAS ERSKINE MAY, K.C.B., D.C.L., Clerk of the House of Commons. Eleventh edition. Edited by T. Lonsdale Webster and William E. Gray, London. William Clowes & Sons, Limited, 7 Fleet Street. 1907.

The first edition of this standard work was published in 1884, since which time it has been, as every one knows, the hand book of all parliamentarians, and a mine of information on all matters connected with parliamentary law and procedure. It is unnecessary to say more than that this edition in all respects is up to the high standard attained by the publishers.

The Law of Private Property in War, by NORMAN BENTWHICH, London. Sweet & Maxwell, Chancery Lane. 1907.

This book of 151 pages is the Yorke prize essay for 1906, and contains also a chapter on conquest. It brings the subject down to the present time, necessarily referring to the interesting events which took place in connection with this subject during the war in South Africa and that between Russia and Japan.

Flotsam and Jetsam.

We have receiced a lengthy report of a gathering of the friends of Mr. John Crawford, of Aylmer, who has recently left for Red Deer, Alberta. Mr. Crawford was the oldest practitioner in the County of Elgin, and that he was held in high esteem by his brethren is quite evident from the complimentary addresses on the occasion referred to. His friends wish him success in his new sphere of labour.

A learned judge in one of the appellate Courts in the United States recently read to the New York University Law School Alumni Association a "last will," which he said "was the most remarkable document that ever came into his posses-

sion." The testator was almost unknown beyond his own circle, and had but little of this world's goods; but he has bequeathed something better than money in the beautiful thoughts in the exquisite conceit we reproduce. Some said he was weak of intellect. If so, we only wish there were more afflicted in the same way. Our readers will thank us for giving them this as good reading in a midsummer number:—

"Item: I give to good fathers and mothers, in trust for their children, all good little words of praise and encouragement, and all quaint pet names and endearments, and I charge said parents to use them justly and generously, as the needs of their children may require.

"Item: I leave to children inclusively, but only for the term of their childhood, all and every the flowers of the fields and the blossoms of the woods, with the right to play among them freely according to the customs of children, warning them at the same time against thistles and thorns. And I devise to children the banks of the brooks and the golden sands beneath the waters thereof, and the odors of the willows that dip therein, and the white clouds that float high over the giant trees. And I leave the children the long, long days to be merry in, in a thousand ways, and the night and the moon and the train of the Milky Way to wonder at, but subject, nevertheless to the rights hereinafter given to lovers.

"Item: I devise to boys jointly all the useful idle fields and commons where ball may be played; all pleasant waters where one may swim; all snow-clad hills where one may coast, and all streams and ponds where one may fish; or where, when grim winter comes, one may skate; to have and to hold the same for the period of their boyhood. And all meadows with the clover blossoms and butterflies thereof, the woods and their appurtenances, the squirrels and birds, and echoes of the strange noises, and all distant places which may be visited, together with the adventures there found. And I give to said boys each his own place at the fireside at night, with all pictures that may be seen in the burning wood, to enjoy without let or hindrance and without any incumbrance or care.

"Item. To lovers I devise their imaginary world, with whatever they may need, as the stars of the sky, the red roses by the wall, the bloom of the hawthorn, the sweet strains of music, and aught else by which they may desire to figure to each other the lastingness and beauty of their love."

A disciple of Coke, in Charleton, S. Car., when asked by a "brudder" to explain the Latin terms de facto and de jure replied: "Dey means dat you must prove de facts to de satisfaction ob de jury."

The second day drew to its close with the twelfth juryman unconvinced.

"Well, gentlemen," said the Court officer, entering quietly, "shall I, as usual, order twelve dinners?"

"Make it," said the foreman, "eleven dinners and a bale of hay."—New York Press.

UNITED STATES DECISIONS.

NEGLIGENCE.—That it is not negligence, as matter of law, for one approaching a bridge crossing a railroad track to fail to stop, look, and listen, is held, in *Heinmiller* v. *Winston* (Iowa), 6 L.R.A. (N.S.) 150.

Personal discomfort to neighbouring property owners because of the location and operation, without negligence, of railroad tracks, depots, and side tracks under legislative authority is held, in *St. Louis, S. F. & T. R. Co.* v. *Shaw* (Tex.), 6 L.R.A. (N. S.) 245, to give them no right of action against the railroad company.

The right of persons in charge of a railway train to presume that a child on the track will appreciate the danger and get out of the way of the train is denied in *Southern R. Co.* v. *Chatham* (Ga.), 6 L.R.A. (N.S.) 283.

The Living Age, Boston, U.S.A.

Two subjects of large current interest are discussed in the shorter papers in The Living Age, for June 8: The Rights of Subject Races, in an article from the London Nation; and President Roosevelt and the American People, from The Spectator. The Control of the Public Purse, reprinted in The Living Age for June 22, from the Monthly Review, is one of Michael MacDonagh's pleasantly informing articles touching English governmental relations and methods. Harmless Beverages in Relation to Health, in The Living Age for June 22, gives some highly important suggestions on certain much-discussed points with the authority of an expert and the charm of a clever essayist.

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VOL. XLIII. SEPTEMBER. NOS. 17 AND 18.

MARRIAGE WITH DECEASED WIFE'S SISTER.

In view of the recent change in the law of England it will be of interest to refer to an article on this subject which appeared in our columns two years ago (ante, vol. 41, p. 345), where it was discussed at some length.

The contest between the Lords and the Commons has at length been concluded by a victory for the latter and for those who for years have sought to legalize marriage between a man and his deceased wife's sister. As our readers are aware the law now passed in England has been in force in this country since 1882.

The enactment as it now appears in the Revised Statutes of Canada, 1906, c. 105 (which is an epitome of 45 Vict. c. 42 and 53 Vict. c. 36) is thus expressed: "A marriage is not invalid merely because the woman is a sister of a deceased wife of the man or a daughter of a sister of a deceased wife of the man."

This provision now appears in its proper place in the statute book, not hidden away as it was in the revision of 1886 as an Act which was "not considered a proper Act to be consolidated." This has already been remarked upon as odd on the part of the revisers; but whatever was the cause of this the opposition to the change both here and in England came from the clergy of the Churches of England and of Rome. It may be noted that there is no legislation as to the marriage of a widow with her deceased husband's brother, possibly for the reason suggested in the article referred to at page 356.

The subject matter of the judgment delivered by the Chancellor of Ontario referred to in *Re Solicitor*, post p. 575 is of much interest to the profession. A correspondent takes exception to the conclusion arrived at, but we cannot, of course, without a full understanding of the facts and reasons given by the learned Chancellor for his decision, criticise his findings. But assuming that these are in accordance with the existing state of the law as to costs between solicitors and clients, the thought arises whether the ancient law of champerty is entirely in keeping with the business relations and social conditions existing in the beginning of the 20th century. It has been, and often is a hardship on clients to prevent an agreement whereby the solicitor is to share with the client in the proceeds of a litigated claim as compensation for services rendered. A poor man may thus be prevented from recovering a claim to which he is justly entitled. The subject, however, is a large one, and any change in the law could only be made after careful consideration, and ascertaining, as far as possible, the result in other countries of a change in the old law of England to one which many contend is a more beneficial system and more in accord with present conditions. We should be glad to hear from some of our subscribers as to their views on this subject.

According to the *Law Times* a remarkable feature of the legislation in England of the last twenty years is the manner in which it has resulted in the separation of the law of England and Ireland. Common law and equity, of course, form the basis of the law in both countries, but the statute law of the two countries is drifting farther and farther apart. An evidence of this development is the fact that English text books are becoming less useful in Ireland than they formerly were. That such a retrograde movement in matters appertaining to jurisprudence should take place in the twentieth century is curious, and it would seem to be only possible in the case of the "sister kingdom" and that for a reason well understood by those who live there, but which apparently is impossible of remedy.

It has been the complaint in England for years past that the administration of justice there is in a very unsatisfactory condition, and that considerable changes must be made and more money spent if the country is to have speedy and efficient justice. The Attorney-General has promised that the many reforms suggested in the recent debate on the subject as being necessary will be taken into consideration and it is thought that the evils may to a great extent be remedied by the increase in the number of their judges and the remodelling of their circuit system. As a Court of Criminal Appeal has been decided upon, that will impose further serious duties upon the Bench and will, it is supposed, occupy the time of at least three judges. As a preliminary the House of Commons has passed a motion praying His Majesty to appoint an additional judge for the King's Bench Division.

THE POWER OF APPELLATE COURTS TO CUT DOWN EXCESSIVE VERDICTS.

The action of many of our Appellate Courts in cutting down verdicts of juries as excessive is worthy of careful consideration. It would seem that, in the connection many of our Courts have almost lost sight of the underlying maxim of our jury system that "Ad questionem facti uon respondent judices, ad questionem juris non respondent juratores." That this maxim is not of universal application was clearly pointed out by Professor Thayer.[1] That it did apply in the case of verdicts rendered by juries, where the element of passion or prejudice was not shewn to have entered, and no mistake of law alleged, was unquestioned until the last few years. Theoretically the power of the Courts in this respect is the same to-day, unless changed by statute, as it was a century ago. The change that has taken place in practice is well illustrated by extracts from decisions rendered at different periods in our judicial history. In the case of *Townsend* v. *Hughes*,[2] decided in the time of Charles II., a new trial

[1] "Preliminary Treatise on Evidence at the Common Law," c. 5.

[2] 2 Mod. 150.

was demanded on the ground that excessive damages had been given. It was refused, one of the judges remarking, "Suppose the jury had given a scandalous verdict for the plaintiff as a penny damages, he could not have obtained a new trial in hopes to increase them; neither shall the defendant in hopes to reduce them." In a New York case decided in 1812,[3] the Court stated that, "Unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the Court to believe that the jury must have acted from prejudice, partiality or corruption, we cannot consistently with the precedents, interfere with the verdict." The rule here laid down was followed unquestioningly until the last few years. The modern tendency is illustrated in a recent Washington case[4] where the Court cut down the verdict, remarking that, "a duty devolves upon the Court to restrain juries from awarding verdicts unnecessarily large." No claim was made that the jury had been actuated by passion or prejudice. The old rule was likewise pared down by the California Courts until, according to one case, it is sufficient to justify a remission of part of the damages given by a jury if the evidence is "very clear" that an excess has been given.[5] The Supreme Court thus sets up its opinion as to what is a proper verdict against the opinion of the jury, and declares its intention of overruling the opinion of the jury whenever there is a substantial disagreement. The Court considers, not what verdict "might" be given by reasonable men, but what verdict "ought" to be given. The fallacy of this was pointed out by Lord Halsbury in an English case some years ago.[6] If the objection is made that passion or prejudice must be shewn the Court will reason thus: "We have examined the evidence and conclude that the verdict given is excessive. Therefore, the jury must have been influenced by passion or prejudice to render

[3] *Coleman* v. *Southwick*, 9 Johns. 45, 6 Am. Dec. 45; *Acc. Coffin* v. *Coffin*, 4 Mass. 1; *Collins* v. *Council Bluffs*, 32 Iowa 324.

[4] *Hart* v. *Cascade Lumber Co.*, 39 Wash. 279.

[5] *Trabing* v. *Cal. Nav. & Imp. Co.*, 65 Pac. 478. (Not reprinted in full in Cal. Reports).

[6] *Metropolitan R. Co.* v. *Wright*, 11 App. Cases 152.

such a verdict.'"[7] In many cases the necessary element of passion or prejudice is absolutely disregarded by the Appellate Court. It will merely consider the evidence, and if it concludes that the amount of damages given by the jury is excessive, will proceed to cut it down.[8] A distinction is often made between excessive verdicts rendered by mistake and those rendered under the influence of passion or prejudice.[9] It is claimed that an excessive verdict may be honestly rendered by a jury, and that where such is the case, the Appellate Court may require a remittitur or allow a new trial. Where the damages are liquidated, such a distinction may rightfully be made. But where they are not liquidated and no mistake of law is alleged, the only ground on which the Court can require a remittitur is that it disagrees with the jury in regard to the weight to be given to the evidence. This however is not sufficient to justify the intervention of the Court. The power to interfere with the verdict of the jury in such a case does not belong to it unless expressly given by statute. This class of cases was entrusted to juries for the very reason that their opinion was regarded as more valuable than the opinion of a Court. Where passion or prejudice is shewn to have actuated a jury in rendering a verdict, even though the damages are liquidated, some Courts will attempt a calculation at the part that such factor has played, and will cut down the verdict accordingly.[10] The same objection exists to such action that was mentioned in the former case. The verdict of a Court is substituted for the verdict of a jury. The additional and more vital objection exists that if passion or prejudice is found, the verdict is vitiated, that the discovery of one of those elements ipso facto nullifies the verdict and renders it incapable of lawful ratification, even in part. An interesting answer was made to this objection by a Tennessee Court. It was there held that if a reduc-

[7] Cf. *Chicago & N. W. R. Co.* v. *Jackson*, 55 Ill. 128.

[8] Cf. *Gallamore* v. *Olympia*, 34 Wash. 390.

[9] Enc. of Pl. & Pr., vol. 18, p. 144.

[10] *Trow* v. *Village of White Bear*, 78 Minn. 432, 80 N.W. Rep. 1117; *Baxter* v. *C. & N. W. R. Co.*, 104 Wis. 307, 80 N.W. Rep. 644.

tion in the verdict was made with the assent of the plaintiff, that the verdict was thereby "purged of its taint."[11] But if passion or prejudice actuated the jury in the formation of its verdict the Court has no right to attempt such calculation as to the part played by those elements, and frame a verdict accordingly. As was said in a Missouri case,[12] the Court has "no scales by which it can determine what portion is just, and the result of reason, based upon the evidence and what part is poisoned by prejudice and passion."

The real reason for this tendency on the part of our Appellate Courts to reduce verdicts, is expressed by Justice Marshal, of Wisconsin, that it should be taken as indicating that "our jurisprudence is still developing towards the ideal of perfection where the administration of the law is truly the administration of justice," and not as "a tendency to narrow or invade the functions of the jury."[13] The objections of law and logic are, however, only overridden by such a justification. A disclaimer of any intention to invade the province of the jury does not do away with the facts in the case.

The proper action to take would be to adhere to the law[14] as it exists until a formal change should be made. This change has been made in several states upon the refusal of the Supreme Court to reduce verdicts without authority for so doing." The matter may not seem of much importance in this particular matter, but it is only by adherence to the law as it actually exists that rights can be secure. A deviation in one respect may serve as a precedent for a deviation in another. The value of a written Code of laws is largely impaired if it can be varied at the whim of the Courts.

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[11] *Telegraph Co.* v. *Frith*, 105 Tenn. 167, 58 S. W. Rep. 644.

[12] *Gurley* v. *Mo. Pac. R. Co.*, 104 Mo. 211. Subsequently overruled by *Burdict* v. *Mo. Pac. R. Co.*

[13] *Baxter* v. *C. & N. W. R. Co.*, 104 Wis. 307, 80 N. W. Rep.

[14] *e.g.* Ill. Tex. La.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] SINCLAIR *v.* QWEN SOUND. [June 24.

Municipal law—Vote on by-law—Local option—Division into wards—Single or multiple voting.

Section 355 of the Ontario Municipal Act, 3 Edw. VII. c. 19, providing that "when a municipality is divided into wards each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to enable him to vote on the by-law," does not apply to the vote on a local option by-law required by s. 141 of the Liquor License Act, R.S.O. (1897) c. 245.

Appeal dismissed with costs.

Nesbitt, K.C., and *Wright*, for appellant. *Hodgins*, K.C., and *Frost*, for respondent.

N.B.] DALY *v.* BROWN. [June 24.

Executor and trustee—Moneys of testator—Deposit in bank—Authority to draw against—Gift—Sale by executor—Undervalue—Jurisdiction of Probate Court.

D. deposited money in bank in the joint names of himself and a daughter with power in either to draw against it. The daughter never exercised this power and when D. died she and her co-executor of his will, in applying for probate, included said money in their statement of the testator's property.

Held, that the money in bank remained the property of D. and did not pass to the daughter on his death.

An executor sold property of the estate for $800 his wife being the purchaser. On passing the accounts the judge of probate found, as a fact, that the property was worth $1,800 and ordered that the executor account for the difference.

Held, that though the Probate Court could not set aside the sale it had jurisdiction to make such order.

Where by will money was bequeathed to the testator's daughter "to hold and be enjoyed by her while she remains unmarried" with a bequest over in case of her decease or marriage.

Held, that the daughter was only entitled to the income from said money and not to the possession and disposition thereof.

Remarks on the absence from the record of the decree of the Court of original jurisdiction. Appeal dismissed with costs.

Newcombe, K.C., and *McKeown,* K.C., for appellant. *Gregory,* K.C., and *Macrae,* for respondents.

N.S.] [June 24.

CITY OF HALIFAX *v.* MCLAUGHLIN CARRIAGE CO.

Appeal — Stated case — Provincial legislation — Assessment — Municipal tax—Foreign company—"Doing business in Halifax."

An Ontario company resisted the imposition of a license fee for "doing business in the City of Halifax" and a case was stated and submitted to the Supreme Court of Nova Scotia for an opinion as to such liability. On appeal from the decision of the said Court to the Supreme Court of Canada counsel for the City of Halifax contended that the proceedings were really an appeal against an assessment under the city charter, that no appeal lay therefrom to the Supreme Court of the Province, and therefore, and because the proceedings did not originate in a Superior Court, the appeal to the Supreme Court of Canada did not lie.

Held, per FITZPATRICK, C.J., and DUFF, J., that as the appeal was from the final judgment of the Court of last resort in the Province this Court had jurisdiction under the provisions of the Supreme Court Act, and it could not be taken away by provincial legislation.

Per DAVIES, J., provincial legislation cannot impair the jurisdiction conferred upon this Court by the Supreme Court Act. In this case the Supreme Court of Nova Scotia had jurisdiction under order xxxiii, Rule 1 of the Judicature Act.

Per IDINGTON, J. If the case was stated under the Judicature Act Rules the appeal would lie, but not if it was a submis-

sion under the charter for a reference to a judge at request of a ratepayer.

By s. 313 of the charter (54 Vict. c. 58) as amended by 60 Vict. c. 44 "every insurance company or association accident and guarantee company, established in the City of Halifax, or having any branch office or agency therein shall . . . pay an annual license fee as hereinafter mentioned . . . Every other company, corporation, association or agency doing business in the City of Halifax (banks, insurance companies or associations, etc., excepted) shall . . . pay an annual license fee of one hundred dollars."

Held, that the words "every other company" in the last clause were not subject to the operation of the ejusdem generis rule, but applied to any company doing business in the city. Judgment appealed from overruled on this point. See 39 N.S. Rep. 403.

A carriage company agreed with a dealer in Halifax to supply him with their goods and gave him the sole right to sell the same in a territory named, on commission, all monies and securities given on any sale to be the property of the company and goods not sold within a certain time to be returned. The goods were supplied and the dealer assessed for the same as his personal property.

Held, DAVIES and MACLENNAN, JJ. dissenting, that the company was not "doing business in the City of Halifax" within the meaning of s. 313 of the charter and not liable for the license fee of one hundred dollars thereunder.

Appeal dismissed with costs.

F. H. Bell, for appellant. *Newcombe*, K.C., for respondents.

Province of Ontario.

COURT OF APPEAL.

Full Court.] CRAWFORD *v.* TILDEN. [April 22.

Constitutional law—Mechanics' Lien Act—Dominion railway.

A lien under R.S.O. 1897, c. 153, cannot be enforced against the railway of a company incorporated under a Dominion Act,

and declared thereby to be a company incorporated for the general advantage of Canada.

Decision of a Divisional Court, 13 O.L.R. 169, affirmed.

E. L. Dickenson, E. D. Armour, K.C., and *A. M. Stewart,* for various parties.

Full Court.] [April 22.

McKENZIE *v.* GRAND TRUNK RY. CO.

Railway—Farm crossings—Agreement—Maintenance—Rights of land owners—Application to Board of Railway Commissioners.

A railway constructed by the defendants' predecessors in title crossed the plaintiffs' respective farms. In 1854, when the line of railway was being laid down, bridges and an under-pass were constructed by the railway company to enable the owners of the farms to pass from one side of the railway to the other, and were for more than 50 years maintained and used in connection with the plaintiffs' farms, with the knowledge of the defendants and their predecessors in title, without any objection on their part.

Held, on the evidence, that the bridges and under-pass were provided for and enjoyed by the plaintiffs' predecessors in title as part of the agreements or arrangements under which the defendants' predecessors in title acquired their right of way through the lands in question, and the defendants were bound by them. There could be no question of ultra vires; the subject matter of the agreements was within the powers and authority of the railway company in dealing for the acquisition of a right of way. The defendants were in the wrong in assuming to alter or reconstruct the bridges and under-pass without the sanction of the Board of Railway Commissioners; and it was for them, and not for the plaintiffs, to apply to the Board.

Judgments of BOYD, C., and MEREDITH, C.J.C.P., affirmed.

Wallace Nesbitt, K.C., for defendants, appellants. *T. G. Meredith,* K.C., and *D. A. McDonald,* for plaintiffs.

Full Court.] STILL *v.* HASTINGS. [May 13.

Malicious prosecution—Want of reasonable and probable cause—Functions of judge and jury—Nonsuit—Setting aside—New trial.

Appeal by the defendant from the order of a Divisional Court, 13 O.L.R. 322, setting aside a nonsuit and directing a new trial, was dismissed at the hearing.

Moss, C.J.O., Osler, J.A., Garrow, J.A., Meredith, J.A., Riddell, J.] [June 5.

EMERY *v.* FICK.

Parent and child—Conveyance of farm by father to daughters—Agreement for maintenance—Action to set aside transaction—Understanding and capacity of grantor—Absence of undue influence—Improvidence—Status of heir at law as plaintiff.

The decision of a Divisional Court, 13 O.L.R. 178, dismissing an action by one of the heirs at law of the grantor to set aside a conveyance of a farm by a father to his daughters, for undue influence, improvidence, etc., was affirmed, the majority of the Court of Appeal agreeing with the reasons given by the Court below.

Per MEREDITH, J.A.:—If the transaction had been attacked by the grantor in his lifetime, it would have been set aside; it was not so attacked, but rather confirmed; and (per RIDDELL, J., also) no one representing or claiming under the grantor could successfully attack it.

Per RIDDELL, J.:—Since the Devolution of Estates Act, the right of the heir at law to sue to set aside a transaction of this kind is not higher than the right of a residuary legatee to sue in respect of personal property; the plaintiff had no right to bring the action at all until the expiration of the period of the three years fixed by 2 Edw. VII. c. 17, s. 3, amending R.S.O. 1897, c. 127, s. 13; and the fact that the personal representative was made defendant did not assist the plaintiff.

J. S. MacKay, and *J. M. McEvoy*, for plaintiff, appellant. *Douglas*, K.C., and *W. C. Brown*, for defendants.

Full Court.] BOHAN *v.* GALBRAITH. [June 5.

Vendor and purchaser.

The decision of a Divisional Court, 13 O.L.R. 301, affirmed.

Moss, C.J.O.] WADE *v.* ELLIOTT. [June 27.

Court of Appeal—Leave to appeal direct from judgment at trial—Jurisdiction—Amount in controversy.

At the time of the commencement of an action to declare void two mortgages given to secure the same debt, the amount of the debt exceeded $1,000. Upon an application by the plaintiff for leave to appeal direct to the Court of Appeal from the judgment pronounced at the trial, it was contended by the defendant that pending the litigation moneys had been realized by him which reduced the claim below $1,000, but this was disputed by the plaintiff.

Held, that the proper conclusion was that the matter in controversy in the appeal exceeded the sum or value of $1,000 exclusive of costs, and therefore there was jurisdiction under 4 Edw. VII. c. 11, s. 76*a*(O.) to make the order asked for.

A. C. McMaster, for plaintiff. *F. M. Field,* for defendant Elliott.

Full Court.] GEORGE *v.* GREEN. [June 28.

Judgment on default of appearance.

On an appeal by the defendant the judgment of the Divisional Court, reported 13 O.L.R. 189, was affirmed, MEREDITH, J.A., dissenting.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P., Magee, J., Clute, J.] [April 9.

ANDERSON *v.* ROSS.

Covenant—Restraint of trade—Termination of partnership—Covenant not to engage or be interested in competing business—Carrying on business as manager for another.

The plaintiff and defendant were partners in a jewelry busi-

ness carried on in the town of Port Arthur. The articles of partnership provided that the plaintiff should procure her husband to work in the business and to devote his whole time and attention to it; and the plaintiff covenanted that her husband should not, after the determination of the partnership, "carry on or engage or be interested, directly or indirectly, in any business in the town of Port Arthur which shall compete or interfere with the business" of the defendant. After the dissolution of the partnership, the plaintiff's husband entered into the employment of B., as manager of a jewelry business belonging to B., upon premises in Port Arthur situate in close proximity to the shop at which the defendant was carrying on the business which had been carried on by the partnership; and the business of B., was, beyond question one which competed with the business of the defendant.

Held, that what had been done by the plaintiff's husband was a breach of her agreement with the defendant.

Judgment of MABEE, J., reversed.

H. Cassels, K.C., and *R. S. Cassels,* for defendant. *DuVernet,* for plaintiff.

Mulock, C.J. Ex.D.] [April 25.

DUNCAN v. TOWN OF MONTREAL.

Intoxicating liquors—Local option by-law—Passing before expiration of two weeks from the voting.

A municipal council cannot finally pass a local option by-law until the expiration of the two weeks next after the clerk of the council has declared the result of the voting thereon; and a by-law passed before the expiry of such period was therefore quashed.

J. B. MacKenzie, for the motion. *F. E. Hodgins,* K.C., contra.

Boyd, C.] [April 27.

RE PETERBOROUGH COLD STORAGE CO.

Company—Directors—Transfer of shares before first payment made, and to insolvent persons—Breach of duty.

On the issue of lettels patent under Ontario Companies Act, R.S.O., 1897, c. 191, incorporating a company, the directors

subscribed for stock therein, making no provision however, for the payment nor making any calls thereon—while applications for stock by others were only accepted on their paying 25 per cent. on subscription and 25 per cent. on allotment. Subsequently and some time before the company were declared insolvent, the directors knowing of its insolvent condition, and desiring to get rid of their stock, on which nothing had been paid, employed C., the promoter of the company, to procure persons willing to take the stock. C. accordingly procured five persons, whom he knew were of little or no substance, and, as to whom he had carefully abstained from any enquiry, to take all of the stock, except one share for each director on which he could qualify and make the transfers, informing these persons that they would be the directors, and, as to four of them at least, that they would incur no liability on the stock as he would arrange for its disposal. The purchasers were to give their promissory notes for the first 25 per cent. payable in six months without interest, but instead of the notes being delivered when the transfers were made, and made payable to the directors, and endorsed over by them to the company, the were delivered prior thereto, and made payable to the company itself, the object being that they should be treated as a payment of the 25 per cent. for which the directors were liable.

Held, that the transfers were invalid, as being made contrary to s. 30 of the Act before all calls had been paid, the liability for the 25 per cent. being substantially the same as a call; and also in that the directors were guilty of a breach of trust in not exercising their powers in the best interests of the company. The directors were therefore directed to be placed on the list of contributories for this stock.

Order of the local master at Peterborough reversed.

R. E. Wood, for liquidator. *D. O'Connell*, for directors.

Boyd, C., Magee, J., Mabee, J.] [April 29.

CARPENTER *v.* CARPENTER.

Covenant—Restraint of trade—"Continue to carry on business" —Sale of business to company—Covenantee interested in company and acting as manager.

The plaintiff and defendant were engaged as partners in the business of nurserymen and fruit sellers. Upon dissolving part-

nership, the plaintiff continued the fruit branch and the defendant the nursery branch, each agreeing that for ten years he would not engage in the kind of business to be done by the other. The defendant's covenant was that he would not compete with the plaintiff the fruit business, provided the plaintiff should "continue for such time to carry on the fruit business."

Held, that this was to be read as a personal engagement for ten years by the defendant that he would not interfere with the fruit business of the plaintiff, provided that the plaintiff should always during that time continuously carry on as proprietor that business; and the plaintiff had ceased to carry on the fruit business by entering into an incorporated company and transferring to that body his plant, property, and goodwill in the business, although he was a shareholder and as manager while the company did business, and when that ceased, resumed the fruit business on his own account; and therefore he was not entitled to restrain the defendant from engaging in the fruit business during the ten years. *In re Sax, Barned* v. *Sax* (1893), 62 L.J. Ch. 688, 68 L.T.N.S. 849, approved and applied.

Judgment of CLUTE, J., affirmed.

Washington, K.C., for plaintiff. *Lynch-Staunton*, K..C, for defendant.

Divisional Court.] [May 2.

IN RE WYNN AND WESTON.

Municipal corporations—By-law—Motion to quash—Persons entitled to vote.

Held, 1. Upon an application to quash a municipal by-law on a proper interpretation of s. 348 of the Con. Mun. Act, 1903, the clerk was justified as treating as included in the list of voters therein referred to the names of persons found to be entitled to vote by the county judge, upon revising the voters' list of the municipality.

2. The provisions of s. 368 requiring a statutory declaration of secrecy to be made by every officer and clerk authorized to attend at a polling place is directory only and that the failure of the officers to comply with its requirements does not invalidate the election.

3. It is competent for the council not to hold a poll in each

sub-division of the municipality if in its judgment it is thought expedient not to do so.

Harrison, K.C., for the motion. *Irwin,* K.C., for the municipality.

Anglin, J.—Trial.] [May 3.

TORONTO GENERAL TRUSTS CORPORATION *v.* KEYES.

Gift—Fund deposited with trust company in names of donees—Executed trust.

Mrs. P. deposited with the plaintiffs $3,000 in the names of three of her relations, the defendants, $1,000 for each, and obtained from the plaintiffs three documents acknowledging the the receipt from each of the defendants of $1,000 "in trust for investment," and guaranteeing the payment of interest. Mrs. P. informed the three defendants of what she had done, saying that the money deposited was theirs and they could draw it. She, however, retained the receipts in her own possession, where they remained until her death, and did not inform the defendants of their existence. The cheques for the interest which occurred during Mrs. P.'s lifetime were made payable to the three defendants, but were indorsed by them in favour of Mrs. P., and were cashed by her for her own benefit.

Held, that there was a complete and executed trust created by Mrs. J., enforceable by the defendants, the cestuis que trust.

Gorman, K.C., for plaintiffs. *H. Fisher,* for defendants.

Mulock, C.J., Anglin, J., Magee, J.] [May 5.

RE KEMP.

Life insurance—Declaration in favour of wife and children—Variation in favour of creditor beneficiary—Intention to exonerate estate from the debt—Invalidity—Trust—Improper exercise of power.

By sub-s. 1 of s. 159 of R.S.O. 1897, c. 203, the insurance money payable under a benefit certificate to preferred beneficiaries is constituted a trust fund therefor, and so long as any object of the trust remains shall not be subject to the control

of the insured or his creditors or form part of his estate. By sub-s. 1 of s. 160 the insured is empowered to vary the apportionment in favour of one or more of the preferred beneficiaries; and by s. 2 no authority is deemed to be conferred to divert the moneys from the class to a person not of the class or to the insured himself or his estate.

Hislop, for appellants. *Carey*, for respondent.

Meredith, C.J.C.P., Magee, J., Mabee, J.] [May 15.

VEZINA *v.* W. H. NEWSOME CO.

Foreign judgment—Quebec Courts—Company not domiciled or resident in Quebec—Nullity—22 Vict. c. 5, s. 58(C.)—International law.

In an action brought in a County Court in the Province of Ontario upon a judgment recovered in a Circuit Court in the Province of Quebec, against an incorporated company, who, at the time the Quebec action was begun, had no office or agent in the Province of Quebec.

Held, that the Act of the Legislature of the Province of Canada, 22 Vict. c. 5, s. 58, is not now in force, and *Court* v. *Scott* (1881), 32 C.P. 148, is no longer applicable; the binding effect of the judgment sued on depended upon the rules of international law; and the defendant company not having been domiciled or resident in Quebec when served with the writ of summons, the judgment there obtained must be treated in the Courts of Ontario as a nullity.

Judgment of the County Court of York reversed.

Cohen, for defendants. *Raney*, for plaintiff.

Britton, J.] [May 25.

RE HALLIDAY AND CITY OF OTTAWA.

Municipal law—Early closing by-law—Motion to quash—Right to shew on that petitioner not of specified class—Month in which by-law was to be passed—Time directory—Right of withdrawal before final passing.

On a motion to quash an early closing by-law, passed under the Ontario Shops Regulation Act, R.S.O. 1897, c. 257, it may be

shewn that persons who signed the petition as presumably of the trade or business whose shops the by-law was designed to close, were not as a matter of fact of such trade or business.

In this case where the by-law was for the early closing of grocer shops, it was proved on the motion to quash that a number of the names in the petition were not of the requisite class, and that after striking off the names of such persons, there was not the three-fourth majority required by the Act, that the by-law therefore could not be supported, and must be quashed.

Semble, 1. The time specified under the Act for the final passing of the by-law, namely one month after the presentation of the petition is merely directory, and therefore the fact of the passing of the by-law after the lapse of such period is not necessarily fatal.

2. Under this Act the petitioners have the right of withdrawal before the final passing of the by-law, it being different from a petition for a local improvement or drainage by-law, where property is to be benefited by an expenditure of money and to be assessed, and in which there is a quasi contract.

R. S. Code, for applicant. *T. McVeity*, for City of Ottawa.

Riddell, J.] [May 25.

IN RE ARMOUR AND TOWNSHIP OF ONONDAGO.

Municipal corporations—Local option by-law—Mode of computing three-fifths majority—Qualification of voters—Finality of roll—Subsequent disqualifications—Deputy returning officers—Right to vote—Indian reserve—Necessity for exclusion from by-law—Designation of newspaper—Three weeks—Computation of—Inclusive of Sundays and holidays—Irregularities in meetings of council—Illegality in election of members—Scrutiny—Non-statement of on face of by-law.

The proper mode of dealing with votes improperly cast on the submission of a local option by-law under 6 Edw. VII. c. 47(*o*) is to deduct them from the total number cast, and take two-thirds of the remainder.

The Court will not, under s. 89 of 3 Edw. VII. c. 19(*o*), enquire into the qualification of those entered on the voters list. *Reg. ex rel. McKenzie* v. *Martin* (1897) 28 O.R. 523 followed.

Objection to the following votes by reason of what had taken

place after the final revision of the roll, were over-ruled and the votes held good:

(1) Where two farmers' sons were assessed as owners, the father being the owner of the farm, the subsequent death of the father and the devise of the farm to one of the sons, (2) Where a farmer's son was assessed as owner, the father being the owner of the farm, the subsequent sale of the farm by the father, but who acquired another farm before the voting.

The following votes were also held good: (1) where the son, the voter, lived with his mother, who had a life estate in the property with a power of appointment amongst a class included the son, (2) A farmer's son, assessed as owner and living with his father, the owner of the farm, but who subsequently became the tenant, (3) A farmer's son assessed as owner, living with his father, the owner, but carrying on a blacksmith business off the property, (4) An infant who became of age before the voting took place, (5) A farmer's son, the father and another being tenants in common of the farm, (6) Where the property had been acquired after the roll had been made up, but before the final revision thereof.

Deputy returning officers, are not entitled to vote on such a by-law, s. 347 of 3 Edw. VII c. 19(O.) not overcoming the effect of s. 351 of the Act whereby they are debarred from voting; nor is it necessary that they should be selected before the publication of the by-law, and their names mentioned therein, nor was it necessary to name a day for the final passing of the by-law, these being cured by 4 Edw. VII. c. 22, s. 8(O.).

An Indian reserve, within the territorial limits of a township, but over which the municipal council had no jurisdiction, need not be specifically excepted in the by-law, for the municipal council must be assumed to have dealt only with the territory within their jurisdiction.

An objection to the designation of the newspaper in which the notice was published was overruled, where it appeared that the name used was that given in the display head, the name contended for being that contained in the sub-title of the paper.

In construing the word "week" in dealing with the required three weeks publication of the by-law, it must be taken in its ordinary acceptance which would include Sundays and holidays, and therefore, not necessarily seven days, exclusive thereof.

Irregularities in the meeting of the township council, or ill-

legality in the election of the members cannot be raised in a proceeding of this character.

Re Vandyke and Village of Grimsby (1906) 12 O.R. 211 referred to.

It need not appear on the face of the by-law that a scrutiny could be demanded.

J. B. MacKenzie, for applicant. *Breuster,* K.C., for township.

Boyd, C., Anglin, J., Magee, J.] [May 28.

MOFFATT *v.* CARMICHAEL.

Costs—Scale of—Action for injury to land—Value of land—Easement—Disturbance of—Damages under $200—Jurisdiction of High Court.

The defendant in the course of severing his house from that of the plaintiff's, which adjoined it, the two houses being built together as one building, by his negligence, damaged the plaintiff's house to the extent of $140, for which he recovered judgment, the property itself was now worth over $200.

Held, that the value of the property, and not the amount of the damages sustained, was the factor in determining the question of jurisdiction, so that the action was properly brought in the High Court, and the plaintiff entitled to tax his costs on the High Court scale. Order of CLUTE, J. affirmed.

Proudfoot, K.C., for appellant. *T. P. Galt,* for respondent.

Falconbridge, C.J.K.B., Britton, J., Riddell, J.] [May 28.

ROMAN CATHOLIC EPISCOPAL CORPORATION *v.* O'CONNOR.

Will—Execution—Procurement by importunity—Setting aside—Construction—Life estate.

The testator had made a will on August 6, when he was very weak and ill. On August 9, when he was in the same condition, according to the medical evidence a condition in which he would do anything and give in anything for the sake of peace and quiet, he executed another will, upon the loud importunity of his sister, who was strong in body and will. He died August 13.

Held, that the will so procured could not stand.

Semble, also, that upon the proper construction of the words of the second will, "I give . . . all my estate . . . to my sister . . . for her own use, with power to sell or dispose of the same as she may see fit . . . and after the death of my said sister I desire the remainder of my estate, if any, to be equally divided between," etc., the sister was entitled to a life estate only.

Judgment of MABEE, J., reversed.

Kelly, for plaintiff. *J. B. Dow*, for O'Connor. *David Henderson*, for Attorney-General.

Teetzel, J.] [June 12.

LESLIE *v.* TOWNSHIP OF MALAHIDE.

Municipal corporations—Contract—Necessity for seal.

The only exceptions to the rule that a corporation can only act by its seal in regard to, (1) Insignificant matters of every day day occurrence or matters of convenience amounting almost to necessity, (2) Where the consideration has been fully executed, (3) Contracts in the name of the corporation made by agents or representatives who are authorized under the seal of the corporation to make such contracts.

Held, that in this case a settlement come to in respect to certain claims against it was not binding on the defendant corporation as not coming under any of the above heads.

Middleton, for plaintiff. *Cameron*, for defendant.

Falconbridge, C.J.K.B., Britton, J., Riddell, J.] [June 17.

WILLIAMS *v.* ANCIENT ORDER OF UNITED WORKMEN.

Life insurance—Benefit society—Change of beneficiary—Wife of member—Foreign divorce—Validity—Estoppel—Re-marriage—Second wife and adopted daughter—Claim of.

The deceased was married in 1860 in one of the United States to M., where they both resided until 1886, when in consequence of his becoming amenable to the criminal law he left and came to Canada where he had since resided, the wife re-

maining in the States and apparently thence forward supporting herself. In 1891, on proceedings taken by M. therefor, the deceased not appearing, she obtained a decree of divorce a vinculo upon the ground of desertion and cruelty. In 1896 the husband went through a form of marriage with one C. and thereafter continued to live with her as his wife down to the time of his death. In 1889 the deceased became insured in a fraternal society for $2,000, which by the benefit certificate was made payable to his wife M., and was so continued until 1896, when he endorsed on the certificate a revocation of the payment to M., and procured a duplicate certificate to be issued, stating that M. was dead, and having the amount made payable to C. and an adopted daughter, and the insurance so continued until his death, C. for several years before his death paying the premiums.

Held, 1. Without deciding whether or not the divorce obtained by M. was valid, that M. under the circumstances could not be heard to impugn the jurisdiction of the Court in the United States she had invoked to grant the divorce.

2. It was not necessary to decide whether or not C.'s marriage was legal, for that the society had not contested its validity and that it was not open to M. to do so.

C. and the adopted daughter were therefore held entitled to the monies.

J. E. Jones, G. Grant, and *M. C. Cameron,* for various parties.

Boyd, C.] BRADLEY *v.* BRADLEY. [June 19.

Vendor and purchaser—Person holding option agreeing to sell —Offering land by auction—Vendors notifying auctioneer not to proceed—Refusal of auctioneer to sell—Loss of resale—Action for damages.

B. one of the beneficiaries of an estate who had given a two weeks' option to purchase certain land for $12,000, less his share of the estate $1,200, agreed to sell same for $13,500, but was allowed by his purchaser to first offer the property for sale by auction to secure if possible a better price. This he proceeded to do, when the defendant, one of the vendors wrote notifying the auctioneer that the plaintiff had no right to sell, whereupon the auctioneer refused to go on with the auction

sale and the purchaser refused to carry out his agreement to purchase, and the two weeks elapsed without B. being able to carry out his option.

Held, that no actionable wrong was shewn on the part of the defendant, for that B.'s only right was that secured him by the option, the right to the performance of which on his payment of the amount specified therein was not interfered with, the agreement made by B. with his proposed purchaser being altogether foreign to the transaction.

W. S. Morphy, W. J. Hanna, and *E. G. Graham*, for various parties.

Boyd, C.] RE SOLICITOR. [June 20.

Solicitor—Contract with client—Share in fruits of litigation—Illegal bargain—Champerty—Refusal of solicitor to proceed unless a round sum paid.

The confidential relationship existing between a lawyer and his client forbids any bargain being made between them, whereby he is to draw a larger return out of the litigation than is sanctioned by the tariff and the practice of the Courts; and especially does the law forbid any agreement whereby the solicitor is to share in the proceeds of a litigated claim as compensation for his services, as being in contravention of the statute relating to champerty, and a violation of the oath of a barrister on his being called to the Bar; nor is it open to a solicitor, during the progress of a case to call upon his client to pay a round sum, or any sum (other than the costs) before he will go on with the action, such being a sort of stand and deliver outrage which the Court will not sanction or allow to stand when once attention is called to it.

A lawyer who was a barrister and solicitor was therefore held disentitled to enforce a bargain made with the client whereby he was to be paid 25 per cent. of the amount recovered on the action, and therefore unable to deduct the amount from the fruits of the judgment which he had received on behalf of the client; nor could he enforce payment of a sum of $200 which the client had agreed to pay him by reason of his refusal to appear for his client on appeal taken by the other side from the judgment recovered for the client at the trial unless such amount were paid.

M. Wright, for appellant. *Middleton*, for solicitor.

Falconbridge, C.J.K.B., Britton, J., Riddell, J.] [June 21.

OSTERHOUT *v.* FOX.

Costs—Scale of—Covenant—Amount due under—Deduction by way of payment or set off—Jurisdiction.

In an action on a covenant in a deed to pay the plaintiff a specified yearly sum, the amount found to be due the plaintiff was the sum of $262.50 from which the trial judge deducted $69.00 which the defendant, at the plaintiff's request, had paid to a creditor of the plaintiff, but which was in no way connected with the covenant, this reducing the amount to $193.50, for which judgment was entered.

Held, that the plaintiff was entitled to costs on the High Court scale, the claim being within the jurisdiction of the High Court, for that the $69 was allowed to the defendant, not by way of payment under the covenant, but as a set off.

Order of TEETZEL, J., recovered.

J. H. Spence, for appellant. *Monahan*, for respondent.

Riddell, J.] RE ASHMAN. [June 24.

Distribution of estates—Absentee next of kin—Advertisement for creditors and others—Publication in newspaper—Failure of absentee to make claim—Bar to future claim.

The administrators of the estate of an intestate, who died in 1906, inserted three times in a newspaper published at the place in Ontario where the intestate had resided, an advertisement headed "Notice to Creditors" given pursuant to R.S.O. 1897, c. 129, calling upon "all creditors and others having claims against the estate" of the deceased to send them in to the solicitor for the administrators by a named date, and stating that after such date they would not be liable to any person of whose claim notice should not have been received. One of the next of kin, who would, if alive, have been entitled to a distributive share of the estate, had left Canada, in 1876, and no communication had since been received from him or information about him, except that soon after his departure a sister of his heard that he was in Oregon, and in 1895 an aunt heard that he was dead. Diligent inquiry was made for him in 1882,

but he was not then found. No one had ever heard of his marrying. No claim was made on his behalf upon the estate.

Held, that the advertisement was sufficient; that it covered next of kin; and that the absentee would be barred if he were hereafter to make any claim; and therefore the administrators should divide the assets amongst those entitled as though the absentee were assuredly dead without ever having had issue.

Horace Pratt, for the applicants, administrators.

Riddell, J.] [June 25.

RE CANADIAN PACIFIC RY. CO. AND BYRNE.

Railway—Lands required for—Infant remainderman—Tenant for life—Order authorizing conveyance—Costs.

Where a widow was entitled to a life estate in certain lands and her infant children to the remainder in fee, and she had made an agreement with a railway company to sell them such part of the lands as they required for their right of way, at a reasonable price approved by the official guardian on behalf of the infants, an order was made by a judge under s. 184 of the Railway Act, R.S.C. 1906, c. 37, giving her power to sell the lands and the rights of the infants therein, which power, joined to her legal power as tenant for life, would enable her to sell and convey the fee; the purchase money to be paid into Court, and the company to pay the costs.

Re Dolson (1889), 13 P. R. 84, followed, the sections of the Act as it now stands being substantially the same as in the Act of 1888.

A. D. Armour, for widow and company. *F. W. Harcourt*, for infants.

Divisional Court.] HOUSE *v.* BROWN. [July 11.

Contract—Incomplete—Price payable by instalments—Deferred payments—Not settled and ascertained—Breach—Damages.

Plaintiff by agreement in writing, sold to defendant a machine to be paid for, part in cash and part in instalments for which notes were to arranged and given after the machine was found satisfactory. The machine was delivered and after trial by the defendant returned as unsatisfactory. In an action for

specific performance and for the price of the machine or in the alternative for damages for breach of the contract.

Held, that although the written agreement named the price, it provided for deferred payments not therein specified and extrinsic evidence shewing that the parties relegated to future negotiations the determination of the terms and amounts of the deferred payments which were not subsequently arranged there was no completed contract: and the action was dismissed.

Judgment of the County Court of York reversed.

Field, for appellant. *F. E. Hodgins*, K.C., contra.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] MARSHALL *v.* SCHWARTZ. [May 4.

Practice—Certiorari—Crown rules.

Appeal from Meagher, J., allowing a certiorari to remove an order for payment of seaman's wages under s. 52 of the Seamen's Act, R.S.C. 1886, c. 74. Appellant relied chiefly on the ground that upon the motion for a writ applicant did not furnish an affidavit verifying the fact that the recognizance and affidavits of justification required by Rule 29 had been filed.

Held, that Rule 29 required such an affidavit, and, following *McIsaac* v. *McNeill*, 28 N.S.R., the requirements of the rule being prohibitive, were therefore imperative. Appeal allowed with costs.

Lane and *J. A. McDonald*, for appellant. *O'Connor* and *Matheson*, for respondent.

Full Court.] CREASER *v.* CREASER. [May 4.

Negligence—Setting fire for fumigating purposes—Stat. of 6 Anne, c. 58.

Defendant placed a tin pan containing sulphur, paper and chips in his hen house for fumigating purposes and after set-

ting fire to the same, retired. The fire spread to the walls of the hen house which was a room in a building also used as a barn; and being communicated to some hay above the hen house, the building was consumed and the fire spread to and destroyed plaintiff's barn. The issues were tried before Forbes, Co. J., who gave judgment for defendant, chiefly on the ground of inevitable accident.

Held, 1, following *Furlong* v. *Carroll*, 7 O.A.R. 145, allowing the appeal, with costs, that the defendant was liable as the case came within the doctrine laid down in *Rylands* v. *Fletcher*.

2. That (though this defence was not pleaded) the use of the fire in the manner indicated did not place defendant within 6 Anne c. 58 which enacts that no suit shall be maintained against a person in whose house a fire occurs accidentally, the accident theory not being applicable to this case; and that the above statute is in force in Nova Scotia.

Mellish, K.C., and *Lane*, for appellant. *O'Connor* and *Matheson*, for respondent.

Province of Manitoba.

COURT OF APPEAL.

Perdue, J.A.] ANDREWS v. MOODIE. [June 10.

Contract—Consideration—Agreement with A. to pay A.'s debt to B.—Novation—Equitable assignment of chose in action.

Appeal from County Court. The defendant's wife having sued him for alimony, they met by arrangement in the office of the wife's solicitor, and in his presence agreed to become reconciled and to resume cohabitation and to settle the suit and the defendant, as a part of the settlement, agreed to pay directly to the wife's solicitor her costs of the action, which were then fixed at the sum of $50. This action was brought by the solicitor to enforce payment of these costs. The particulars of the claim were stated thus: "The plaintiffs claim from the defendant the sum of $50 being the amount of the costs of suit of defendant's wife against the defendant, which the defendant

agreed to pay as one of the terms of settlement between the said parties."

Held, that the plaintiffs could not recover in an action in the form in which it was set up, as the plaintiffs in such an action would be strangers to the contract: *Gandy* v. *Gandy*, 30 Ch.D. 57; Leake on Contracts, p. 292; neither could the plaintiffs sue as cestuis que trustent claiming a beneficial interest under the agreement, for the evidence did not shew that the $50 was to be paid to the defendant's wife as trustee for the plaintiffs: *In re Empress Engineering Co.*, 16 Ch.D. 125. But that there was under the circumstances an equitable assignment of the wife's claim for costs to the solicitors, which was assented by the three parties all present together, and which enabled the plaintiffs, by an amendment of their particulars of claim, to maintain an action in their own names for the costs in question, and that, upon such amendment being made, the verdict in favour of the plaintiffs in the County Court should be allowed to stand. Appeal dismissed without costs.

Burbidge, for plaintiffs. *Phillipps,* for defendant.

Richards and Perdue, JJ.A.] [June 29.

SLINGSBURY MANUFACTURING CO. *v.* GELLER.

Partnership—Limited partnership—R.S.M. 1902, *c.* 129, *ss.* 61-81.

Appeal from decision of PHIPPEN, J.A., noted ante, p. 219, allowed with costs.

Held, that Rosenthal, having agreed to enter into a partnership with his co-defendants, though intending to take advantage of the provisions of the Act so as to limit his liability to that of a special partner, and having contributed $4,000 to the capital of the firm not as a loan, as he had failed to comply with such provisions, had made himself liable, upon common law principles, as a general partner.

To become liable as a general partner, it is not necessary that the person should be clothed with authority to bind his fellow partners as their agent. He may be a silent or dormant partner and yet liable as a general partner.

Pooley v. *Driver,* 5 Ch.D. 474, followed.

Cameron and *Phillipps,* for plaintiffs. *Bradshaw,* for defendant Rosenthal.

Full Court.] [June 29.

UNION BANK *v.* DOMINION BANK.

Bank cheque—Forgery—Indorsement of cheque—Liability as between banks for loss of money paid on forged cheque.

Appeal from decision of DUBUC, C.J., noted vol. 42, p. 773, allowed with costs.

Held, that, the cheque having been marked on the back with the rubber stamp of the Dominion Bank before going through the clearing-house in a manner which, under the rules of the clearing and the practice among Winnipeg bankers, had the legal effect of an indorsement in blank, the defendants were liable to repay the amount to the plaintiffs either by the direct effect of the statute: Bills of Exchange Act, R.S.C. 1906, c. 119, ss. 50, 133(c); or because of the warranty to be implied from their indorsement that the cheque was what it purported to be and that they were the lawful holders: *Bank of Ottawa* v. *Harty*, 12 O.L. R. 218.

Held, also, that the fact that the defendants waited until after they knew that the plaintiffs had honoured the cheque before paying out the $800 to the forger, made no difference, as the liability was either statutory or contractual.

Leather v. *Simpson*, L.R. 11 Eq. 398; *Smith* v. *Mercer*, 6 Taunt. 76, distinguished. *London & River Plate Bank* v. *Bank of Liverpool* (1896), 1 Q.B. 7 dissented from.

Wilson, for plaintiffs. *Munson*, K.C., and *Laird*, for defendants.

Howell, C.J.A.] WATT *v.* DRYSDALE. [July 8.

Animals running at large—Fences—By-law regulating.

Appeal from the verdict of County Court judge. The plaintiff's claim was for damage to his crops caused by the cattle of defendant, an adjoining proprietor, breaking through the line fence between the two farms. At the trial before the County Court judge it was shewn that such line fence was not of the character required by the by-law of the municipality. The by-law contained a clause (No. 7) providing that no person should be entitled to recover damages for injuries done to his crops by trespassing cattle unless his fences were of the character required by the by-law. It also contained a number of clauses

prohibiting the running at large of animals of various kinds at any time and of certain animals from sunset to sunrise the next morning from June 1st to October 15th, but there was no express permission for the running at large of any animals at any time. The trial judge found that the plaintiff had suffered damages to the extent of $50; but, holding the by-law referred to valid, decided that it precluded the plaintiff from recovering and entered a verdict for defendant. At the hearing of the appeal it was argued that cl. 7 of the by-law was authorized by s. 644(d) of the Municipal Act, R.S.M., 1902, c. 116, which says that the council of every municipality may pass by-laws "for limiting the right to recover damages for any injury done to any cattle, horses or sheep trespassing upon land . . . to cases in which the land is enclosed by a fence of the nature, kind and height required by the by-law," but that sub-section did not become law until after the date of the passing of the by-law.

Held, that the subsequent legislation did not ratify or legalize the previously existing by-law, that there was no legislative authority for the enactment of clause 7 at the time the by-law was passed, and that there was nothing to prevent the plaintiff from recovering the damages sued for. *King* v. *Nunn,* 15 M.R. 288, followed.

Appeal allowed with costs and verdict entered for plaintiff for $50 and costs.

Haggart, K.C., for plaintiff. *Mulock,* K.C., for defendant.

KING'S BENCH.

Richards, J.A.] MITCHELL *v.* WINNIPEG. [May 29.

Municipality—Negligence—Contributory negligence—Notice of action—Winnipeg charter—Remedy over against third party.

The plaintiff's claim was for damages caused by falling from his bicycle into a deep unguarded excavation in a lot owned by the defendant Luce on the corner of a public street and a lane in the City of Winnipeg. He was riding down an inclined part of the highway towards and close to a portion of it which was only about 30 feet wide and which was obstructed for half the width by a pile of building materials and, observing that the

remainder of the roadway was at the moment occupied by a team with a loaded waggon, he attempted to stop by back-peddling. But the chain then came off the sprocket wheel, and, being unable to check his speed, he tried to turn into a lane on the higher side of the obstructions. His speed was too great, however, and he ran into the excavation at the edge of the lane, being seriously injured. It was clear that the defendant Luce was responsible for both the obstructions on the street and the unguarded excavation. It also appeared that the proper city officials had notice of the obstructions being on the street for a considerable time previously.

It was contended on behalf of the city that the plaintiff was guilty of contributory negligence, as he was aware of the condition of the street and of the chance that it might be wholly blocked at any time, and that he should not have run the risk of the chain slipping off whilst going down the incline. He was, however, an experienced bicycle rider and had used the same wheel for several years without the chain having ever come off.

Held, that he was not guilty of contributory negligence in the matter.

The city also set up that notice of the claim had not been served on the city clerk, as required by s. 722 of the Winnipeg charter, 1 & 2 Edw. VII. c. 77. The notice relied on was a letter which the plaintiff delivered personally to the chairman of the Board of Works, and which contained full particulars of the accident and of the injuries received. This letter reached the city clerk within the time required by that section.

Held, 1. The statute was sufficiently complied with to entitle the plaintiff to recover.

2. Under s. 728 of the charter, the city was entitled to relief over against Luce for the amount of the plaintiff's judgment and all its costs in the action.

Dennistoun and *Machray*, for plaintiff. *T. A. Hunt*, for the city. *T. R. Ferguson* and *McKay*, for Luce.

Dubuc, C.J.] SHAW *v.* BAILEY. [June 12.

Specific performance—Notice of prior unregistered sale—Fraud.

After the defendant James has sold the property in question to the plaintiff by signing an agreement of sale and a transfer

under the Real Property Act, he made a subsequent sale of the same property to the defendant Bailey who paid the purchase money, registered his transfer and obtained a certificate of title. The plaintiff's purchase money was not paid over and he had neglected to register his transfer, but relied on the fact that his solicitor had told Bailey of the prior sale before he purchased. The latter, however, was afterwards informed by one Watson, a real estate agent, that the property had not been sold but had been placed by James in his hands, for sale. James himself also told Bailey that he had not sold the property and Bailey's solicitor made due search at the Land Titles Office and found that the property still stood in the name of James.

Held, that, under ss. 71, 91 of R.S.M. 1902, c. 148, Bailey's title could only be impeached for fraud, and that the circumstances did not shew fraud on Bailey's part. In order to bring abstinence from inquiry within the category of actual notice there must be wilful abstinence from inquiry and a fraudulent determination not to be informed: *Stark* v. *Stephenson,* 7 M.R. 381. Specific performance refused with costs.

Robson and *Taylor,* for plaintiff. *Anderson* and *Garland,* for defendants.

Dubuc, C.J.] [June 12.

PEDLAR *v.* CANADIAN NORTHERN RY. CO.

Railways—Negligence—Failure to ring bell on approaching highway crossing—Contributory negligence.

The plaintiff's team of horses and waggon were struck by an engine of defendants on a highway crossing in the City of Winnipeg. The horses were killed and the waggon and harness damaged. The evidence was conflicting as to whether the whistle had been blown on approaching the crossing, but it was clear that the bell had not been sounded as required by s. 224 of the Railway Act, 1903. There was, however, some evidence to shew that the driver of the team could easily have seen the engine approaching, if he had looked. The learned judge inclined to the belief that the driver had been negligent in that respect, and that the plaintiffs could not recover because of such contributory negligence: *Winkler* v. *G.W.R.,* 18 U.C.C.P. 250; *Johnston* v. *Northern Ry. Co.,* 34 U.C.R. 432, and *Weir* v. *C.P.R.,* 16 A.R. 100.

The judgment for defendants, however, was founded on the exception within brackets in the section referred to, which provides that the whistle shall be sounded and the bell rung continuously (except within the limits of cities or towns when the municipal authority may pass by-laws prohibiting the same).

The plaintiff had not set up that there was no such by-law, nor had he given any evidence to prove it, and it was held that, on that ground, he could not recover.

Action dismissed with costs.

Fullerton, for plaintiff. *Clark,* for defendants.

Dubuc, C.J.] ADAMS *v.* MCGREENY. [June 15.

Contract—Substantial completion of work—Trifling omissions.

Action to recover the amount of the contract price for putting in a steam heating plant for the defendants. The plaintiffs were to "put in a complete job of steam heating" for the sum of $660. There were several objections to the plaintiffs' right to recover, but the only one for which the decision should be reported was that the plaintiffs had omitted to provide floor and ceiling plates around the pipes. These plates were shewn to be worth about ten cents a piece and about $4 for all. On this point the judgment was as follows: "It is true that the contract was an entire one, and substantial performance of such a contract is not sufficient. But the omission to put in those plates must be considered as a trifle; and, under *Lucas* v. *Godwin,* 3 Bing. N.C., p. 744, and *Stevers* v. *Curling,* 3 Scott 755, a trifle of that nature should not be held to prevail so as to make the plaintiffs lose the whole consideration of an otherwise performed contract by such trifling omission."

Monkman, for plaintiff. *Donovan,* for defendants.

Dubuc, C.J.] HEATH *v.* SANFORD. [June 15.

Agreement for sale of land—Specific performance—Statute of Frauds—Authority to agent to sign offer to sell land.

This action was for specific performance of an agreement for the sale of land in the shape of an offer, to hold good for one

week, signed by the defendant's husband and alleged to have been accepted by the plaintiff by letter delivered within the week. The offer did not contain a sufficient description of the property and there was no consideration for the giving of the option. The plaintiff's letter of acceptance was not produced and he had kept no copy of it, but undertook to give the contents in his evidence. The defendant and her husband both swore that the defendant had not given her husband any authority to sign the offer, but the defendant had expressed to the plaintiff a willingness to sell the property at the price mentioned and had referred him to her husband who was not living with her at the time.

In refusing to decree specific performance of the agreement, the learned judge gave his reasons as follows:—

"The facts of the case may be summarized thus: The land, though purchased with money given to the defendant by her husband, stands in her name and is legally her property. The agreement or option was signed by the husband and, as sworn to by both, without any formal authority to him to do so. The said document does not give a complete description of the land as it does not state where it is situate, whether in Portage la Prairie or elsewhere. This might be supplemented by oral evidence if everything else was in proper form; but the document itself is thereby incomplete. The letter of acceptance is not produced; its presumed contents are verbally given by the plaintiff, but that is very unsatisfactory. That leaves some uncertainty as to its true contents and even as to its date. The agreement or option is not under seal and was given without any consideration. With such defects, incompleteness, uncertainty and total absence of consideration, I do not see how the Court, under the circumstances of the case, can decree specific performance of the said agreement." Action dismissed with costs.

Hudson and *McPherson,* for plaintiff. *Anderson* and *Williams,* for defendant.

Dubuc, C.J.] GORDON *v.* LEARY. [June 15.

Principal and agent—Undisclosed principal.

The defendant's son, J .G. Leary, with the assistance of defendant, opened up a meat shop in March, 1906, and carried it on for a few months without success under the firm name of J. G. Leary & Co. In the following June, the defendant em-

ployed one Schofield to act as manager of the business at a salary of $75 per month. Schofield thereafter managed the business under the same firm name and from time to time ordered goods from the plaintiffs, which were supplied and charged to J. G. Leary & Co. Schofield had not been expressly authorized to buy goods from the plaintiffs on credit, but found it necessary to do so in order to carry on the business, and told the plaintiffs that the defendant had engaged him as manager, and would be responsible for the account. He also informed the defendant that he was getting goods on credit from the plaintiffs. In the following December, as the business was not paying, the defendant closed it up. Defendant contended that the business was his son's and that he had not authorized Schofield to pledge his credit with the plaintiffs.

Held, that Schofield's acts in ordering the goods were within the authority usually conferred upon an agent of his particular character and that the defendant was bound by them, although he did not expressly authorize them. The charging of the goods to J. G. Leary & Co. instead of to the defendant, might, under the circumstances be considered as a matter of book-keeping, and even if the plaintiffs had known nothing about the defendant's connection with the business, he would be liable as an undisclosed principal on the authority of *Watteau* v. *Fenwick* (1893) 1 Q.B. 346, and *Hutchings* v. *Adams,* 12 M.R. 118. Verdict for plaintiffs for amount claimed with costs.

Fullerton, for plaintiffs. *Elliott* and *McNeill,* for defendant.

Mathers, J.] DOUGLAS *v.* FRASER. [July 11.

Husband and wife—Married Woman's Property Act, R.S.M. 1902, *c.* 106, *s.* 2(*b*)—*Separate property of wife—Ownership of goods in business carried on in wife's name.*

Interpleader issue to determine the ownership of goods seized under execution at the suit of defendant against the plaintiff's husband who married her in 1886. The defendant's judgment was recovered in 1906 upon a debt which had been incurred in 1895, after which the husband became insolvent. In 1899 a fur business was opened up in the name of the plaintiff and had been carried on up to the time of the seizure. From the beginning, the husband managed the business, did all the buying and

selling, handled all the funds and had entire control. The only part the plaintiff took was superintending in the work room in which she herself worked. A large part of the money with which the business was established was derived from the sale by the husband, a few days prior to 21st May, 1900 (when it was enacted that all property standing in the name of a married woman on that date should be deemed to be her property until the contrary is shewn), of a property then belonging to the plaintiff, but which had been given to her by the husband a few years before his failure. This money, $1,300.00, had been received by the husband and deposited with a trustee in trust for himself, before that date.

Held, that, so far as that property was concerned, her claim to it was not supported by the provisions of the previous Act, R.S.M. 1892, c. 95, s. 2 of which gave a married woman who married after 14th May, 1875, without a settlement the right to hold property as a femme sole subject to the concluding words, "but this section shall not extend to any property received by a married woman from her husband during coverture," because the property in question had been received from the husband during coverture, that the plaintiff could only rely on her common law rights as to it, and that at common law the husband had a free hold interest in the land and would be entitled to such proportion of the price for which it was sold as would represent the value of the property during their joint lives.

The business had been started in 1899, except as to about $125 of the plaintiff's own money, with money derived from the rentals of the same property which the learned judge held the husband to have been entitled to at common law, and in 1900 the capital was augmented to the extent of the proceeds of the sale above referred to, a large portion of which the husband was also entitled to according to the above holding.

When the plaintiff commenced business the husband had judgments against him and the wholesale dealers stated that they had sold to the plaintiff and upon her credit and would not have sold to the husband on credit because of the liabilities hanging over him. The business prospered from the beginning and the profits earned in it were used in buying other stock and in generally extending the business. A large portion of these profits were earned after the coming into force of the statute 63 and 64 Vict. c. 27, now R.S.M. 1902, c. 106, and it was contended that they were included in the definition of the word "property" given in s. 2 of the Act, viz., "any real or personal property of

every kind and description of a married woman, whether acquired before or after the commencement of this Act, and shall include the rents, issues and profits of any such real or personal property and includes also . . . all wages, earnings, money and property gained or acquired by a married woman in any employment, trade, or occupation in which she is engaged or which she carries on separately from her husband and in which he has no proprietary interest, etc."

Held, that the business was not a trade or occupation carried on by the plaintiff separately from her husband and that the special mention, in the latter part of the definition, of property acquired by a separate trading excludes from the previous general description property acquired in trading not carried on separately from the husband, and that the Legislature meant to enact that money and property acquired by a married woman by trading in conjunction with the husband should be his and not hers, and therefore the profits of the business were the property of the judgment debtor. The goods seized were mostly if not altogether bought with these profits and the husband was the real and beneficial owner of them although the dealers had sold them to the plaintiff.

Dominion Savings Co. v. *Kilroy,* 15 A.R. 487, and *Dall* v. *Conboy,* 9 M.R. 185, distinguished. *Meakin* v. *Samson,* 28 U.C. C.P. 355, followed.

Pitblado and *McKercher,* for plaintiff. *Daly,* K.C., and *Crichton,* for defendant.

Province of British Columbia.

SUPREME COURT.

Martin, J.] [May 22.

BRYCE *v.* CANADIAN PACIFIC RY. COMPANY.

Shipping—Collision—Overtaking vessel, duty of—Inevitable accident—"Narrow channel"—Evidence—Whether expert witnesses may be heard where Court is assisted by assessors.

On July 21, 1906, steamer Princess Victoria belonging to defendants, collided with and sank the steamer Chehalis, both vessels being on their way westward out of Vancouver Harbour.

Held, on the evidence that the Master of the Princess Victoria gave the signal indicating his course at the earliest time con-

sistent with the position of the vessels, and that he did not neglect to take any proper precaution which a prudent and skilful navigator should have taken in the circumstances.

Where the Court is assisted by assessors, whose duty it is to advise on matters of nautical skill and knowledge, the evidence of witnesses, tendered for expert testimony purely, will not be received.

The Kestrel (1881) 6 P.D. 182, at p. 189, followed.

Bowser, K.C., *Martin*, K.C., *Peters*, K.C., *Schultz* and *Donoghy*, for plaintiffs. *Bodwell*, K.C., *Davis*, K.C., and *McMullen*, for defendants.

Morrison, J.] [July 11.

CHINESE EMPIRE REFORM ASSOCIATION *v.* CHINESE DAILY NEWSPAPER PUBLISHING COMPANY.

Company law—Non-trading corporation created under the Benevolent Societies Act, R.S.B.C., 1897, *c.* 13—*Libel of, whether actionable.*

A non-trading corporation, having the right to acquire property which may be the source of income or revenue, the transaction of the business incidental thereto creates a reputation, rights and interests similar to those of an individual or a trading corporation, and must have the same protection and immunities, and be given the same remedies, in case of injury, as a trading corporation.

Davis, K.C., for plaintiff association. *Sir C. H. Tupper*, K.C., and *Boak*, for defendants.

Full Court.] CAIRNS *v.* B. C. SALVAGE CO. [July 19.

Shipping—Jurisdiction of County Court—Wages—Term of hiring—Accrual of wages de die in diem—Desertion—Forfeiture.

A County Court judge has jurisdiction, in an ordinary action for wages of a seaman, to try a claim for more than $200 where the plaintiff has a good demand at common law; that is, where his cause of action is complete without the aid of the statute. Section 52 of the Seaman's Act merely creates a concurrent tribunal for securing a speedy settlement of claims for

wages. Plaintiff shipped for a voyage of three months. The period expired before the voyage was completed, and while the ship was calling at a port he went ashore, without leave, to seek legal advice, while thus absent the ship sailed.

Held, that he could not be classed as a deserter and had not forfeited his wages.

Peters, K.C., and *Moreshy,* for plaintiff, respondent. *W. J. Taylor,* K.C., for defendants, appellants.

Book Reviews.

International Law, a treatise by L. OPPENHEIM, LL.D., Lecturer in public International Law at the London School of Economics and Political Science (University of London) formerly Professor of Law in the University at Basle. Vol. I. Peace—Vol. II. War and neutrality. Longmans, Green & Co. 39 Paternoster Row, London. 1906. 1,200 pages. Price, for each volume, $9.50.

The author tells us that this treatise is intended to be an elementary book for those who are beginning to study international law—a book for students written by a teacher. Whilst the author thus modestly speaks of his work the reader will see that it gives a complete survey of the subject, discusses all important points, and when space prevents a further pursuit, he refers to other books which go more deeply into the subject. The bibliography given in this treatise to be found at the beginning of each chapter and sub-division will be most useful, enabling those who desire further information on any special subject to refer to the appropriate authority.

Mr. Oppenheim is an original thinker, and seems to have the happy faculty of placing the matter he gives where one would expect to find it. His arrangements are lucid, his definitions sharp and his conclusions, which he is not afraid to express, clearly and concisely stated. The law of nations is so vast that no one book can be expected to contain it all, but we have not seen any treatise which quite as readily puts one in possession of the law, either by stating it or telling you where you can find it.

Leading cases on the Law of Evidence, with notes, by ERNEST COCKLE, of Gray's Inn, Barrister-at-law. Sweet & Maxwell, Limited, 3 Chancery Lane, London. 1907.

The writer's aim has been to select from the English reports leading cases on the most important points of the law of evidence —then to extract the principle from each case and state it as a head-note thereto. This is done in a handy little volume of 224 pages. A preliminary note introduces the cases of a class, and gives a bird's eye view of the leading decisions on that particular branch of evidence. The typographical part of the book is very well arranged, though the names of the cases might better have been in a slightly smaller type.

As the law of evidence is almost entirely case law, one is surprised that something of this sort has not been attempted before. The author has made a good beginning, and we shall doubtless see enlargements and improvements in a later edition.

The Lawyers Reports annotated, new series, Rochester, N.Y., Lawyers' Co-operative Publishing Company. 1907.

We are in receipt of Book 7 of this annotated series of American reports. We have already expressed our opinion upon the excellency of this work and need not further enlarge thereon at present. We have also received the syllabus digest of the opinions reported in the first seven volumes of the new series, with a complete table of cases and a full index of the elaborate annotations. Nothing could be more complete. A separate index of notes precedes the digest, which means that when a person who uses the digest finds a point that he wants, he is at the same time notified if the point is annotated, and is told where the note can be found.

Bench and Bar.

Alexander Dawson, of the City of Winnipeg, in the Province of Manitoba, Esquire, Barrister-at-law, to be a County Court judge for the Eastern Judicial District of Manitoba. (July 10.)

Canada Law Journal.

VOL. XLIII. OCTOBER 1. NO. 19.

ALLOWANCE OF SPECIAL DAMAGES IN ACTIONS FOR WRONGFUL DISMISSAL OF SERVANTS.

1. Scope of article.
2. Physical suffering.
3. Mental annoyance.
4. Impairment of personal or business reputation.
5. Loss of property or of personal freedom.
6. Loss of valuable privileges or opportunities incident to the servant's tenure of the employment.
7. Personal expenses.
8. Money paid to obtain the employment from which the plaintiff was dismissed.
9. Loss of profits sacrificed when plaintiff accepted employment from defendant.
10. Value of plaintiff's inventions.
11. Money invested in, or expended so as to benefit the defendant's business.

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1. **Scope of Article.**—In this article it proposed to state the effect of the cases in which the right of the servant to recover damages for the injurious results of his dismissal other than the loss of the stipulated compensation has been considered. For a general discussion of the criteria which determine proximity and remoteness of causation the practitioner will of course consult a treatise on the subject of damages.

2. **Physical suffering.**—In an Irish case where the contract of the plaintiff, a domestic servant, was subject to termination by either party at a fortnight's notice, and provided that, in the event of her being dismissed without notice, she was to receive the wages then due and also the wages for an additional fortnight, it was held that the jury were not entitled to take into account the fact that she had been expelled from the defendant's

service late at night, without her necessary clothes, and without money, and left exposed during the whole night without shelter, food, or sufficient clothing[1]. The decision was founded on the pleadings submitted to the court. The more general question whether, under appropriate averments, the special damages claimed could have been recovered was not discussed. In the opinion of the present writer the question should be answered in favour of the servant,—a doctrine which is directly sustained by a Texas decision to the effect that, where a person who hired a servant to go to a distant point and work there knew that he was without means, and agreed to furnish food and lodging, and reimburse himself from the wages earned, and the servant on arriving at his destination was refused work, and also subsistence and transportation to his home, and, owing to his lack of means, suffered from hunger and exposure to the weather before reaching home, he was entitled, under proper pleadings, to recover not only the wages lost, but damages for the suffering sustained[2].

[1] *Breen* v. *Cooper* (1869) Ir. Rep. 3 C.L. 621. Fitzgerald, B., said that, upon the pleading in the action, "the plaintiff was entitled to be put so far as pecuniary compensation could put her, in the same position as she would have been if, at the time of her dismissal, she had been paid the wages due to her together with the additional fornight's wages. She could not recover as special damage in respect of any matters, save such as would not have happened to her had the contract been fulfilled by payment of those moneys at the time of her dismissal. I can find no evidence of any damage in this case which would not equally have happened, though the contract had been fulfilled in the respect complained of by payment of those moneys at the time of dismissal."

[2] *Gulf C. & S. F. R. Co.* v. *Jackson* (1902) 29 Tex. Civ. App. 342, 69 S. W. 89. The court said: "While the measure of damages for a breach of a contract of hire would generally be the difference between what would have been earned under the contract and what could have been earned by the exercise of reasonable diligence at other employments during the time covered by the contract, such is not the exclusive measure of damages. If any special damage is pleaded, which is shown to have been in the reasonable contemplation of the parties at the time the contract was entered into as a probable result of its breach, the special damages so shown can be recovered in addition to the damages which would ordinarily result from the breach of the contract. The appellee on his pleadings claimed damages

3. Mental annoyance.—No allowance in the nature of "pretium affectionis," or in consideration of the "pain that might be felt by the servant on the ground that he was attached to his place," should be made[1].

Where a man employed as a locomotive engineer under a contract by which he was to be paid mileage and to go out when called, held himself in readiness for a call for a long period of time, and was called only on a single occasion, when he was not permitted to go out, it was held that he was not entitled to recover for more than this one trip, and that he could not recover for mental worry suffered while he was waiting for a call to go, nor for the support of his family while waiting[2].

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not only for the wages he would have earned under the contract, but for the inconvenience and suffering he sustained by reason of its breach. The evidence shows that appellant's agent was informed before appellee left his home that he was without money or means of any kind with which to procure food and lodging, and that appellant agreed and promised to furnish same, and to reimburse itself out of the wages to be earned by appellee under his contract of employment. Under these facts, we think appellee was entitled, upon the breach of the contract by the appellant, to recover not only for the wages shown to have been lost by him by reason of such breach, but also damages for the suffering sustained by hunger and exposure to the weather; such damages being clearly within the reasonable contemplation of the parties as a probable result of the breach of the contract."

[1] Erle, J., in his opinion delivered to the House of Lords in *Beckham* v. *Drake* (1849) 2 H.L.C. 576, (607). The learned judge sustained his position by the following arguments: "Indemnity for the loss of his bargain in respect of his labour would be settled on the same principle as for the loss of a bargain in respect of common merchandise. If goods are not delivered or accepted according to contract, time and trouble as well as expense may be required, either in getting other similar goods or finding another purchaser, and the damage ought to indemnify both for such time, trouble, and expense, and for the difference between the market price and the price contracted for. Loss of time and trouble would be occasioned by a breach of contract in respect of goods, as well as by a breach of contract in respect of employment; but they are such time and trouble as have a known merchantable value, and the compensation is measured wholly regardless of the consideration which guide where bodily or mental pain is the direct object of contemplation."

[2] *Texas C. R. Co.* v. *Newby* (1897) (Tex. Civ. App.) 41 S.W. 102.

4. Impairment of personal or business reputation.—It seems to be fully settled that compensation for the impairment, if any, of a servant's personal or business reputation which may result from his dismissal, cannot be recovered in an action for wrongful dismissal, under a declaration which merely claims damages generally, and contains no specific averments setting forth the particular facts relied upon as a ground for awarding such compensation[1]. Whether that compensation can be recovered in

[1] In *Walton* v. *Tucker* (Exch. Div. 1880) 45 J.P. 23, it was held that, as the amount paid into court was sufficient to cover the actual pecuniary loss sustained by the servant, and no special damage was proved, he was not entitled to have any question left to the jury, and could not recover anything beyond the amount of that loss. Pollock, B., said: "There may have been a slight imputation on the character of the plaintiff, and it was sought to put in evidence that the dismissal was intended to be prejudicial; but no special damage was proved. It may be that the mode of dismissal was wrong because vindictive; but that could have been proved by the use of words at the dismissal; there was, however, no such evidence. As in Sedgwick (Dam. p. 57), you could inquire quo animo the defendant had acted, but to do so was useless, for there was no allegation of anything of the kind in the statement of claim. What the plaintiff sought to recover was the ordinary damages for the dismissal and for the time he was out of employment, and therefore I am of opinion that the ruling at the trial was correct." Stephen, J., said: "It seems to me that, if we gave way to the argument of the plaintiff, it would introduce an extensive and undesirable change in the law. There are few actions more frequently brought than actions for wrongful dismissal, and it must have happened upon many occasions that the dismissal must have been considered as grievous to a servant, not so much from the monetary loss as from the slur cast upon his character. No case, however, binding upon this court has been produced where such injuries as are now sought to be compensated have been so compensated. I think, therefore, that no such damage can be given, and it seems to me right that it should be so, because if any further damage is due, that further damage must be caused by something which is in itself an actionable wrong. For instance if the plaintiff has been expelled by violence a count for assault might have been added; or if he had been abused, or the cause of dismissal had been stated needlessly so as not to have been within the privilege, an action for slander or malignment would lie. As in this case the plaintiff was neither assaulted nor slandered he ought not to recover more than the actual result of the breach of contract."

That a wrongfully discharged commercial traveller cannot recover damages from his employer for the injury done to the good will of his trade connection by his refusal to send him on journeys was held in *Lagerwall* v. *Wilkinson* (1899) 80 L.T.N.S. 55.

such an action under an appropriate count is a question the answer to which depends upon the rules of pleading which prevail in the given jurisdiction. The language used in several of the cases cited in the last note is fairly susceptible of the construction that damages under this head were regarded by the courts as being recoverable, if specially averred[2]. There is indeed no apparent reason why such a joinder of claims should

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In *Lee* v. *Hill* (1888) 84 Va. 919, 6 S.E. 178, it was categorically laid down that neither special damage for loss of character, nor anything beyond compensation for loss of his contract, be recovered under a mere general claim for damages.

In *De Puilly* v. *St. Louis* (1852) 7 La. Ann. 443, the right of an architect to recover damages on this footing was denied without any qualification.

In *Berlin* v. *Cusachs* (1905) 114 La. 744, 38 So. 539, it was laid down that the employer is not liable for remote collateral damages arising from unjust unauthorized inferences or conclusions adverse to the employé which the public may draw from the mere fact of the discharge. It was conceded that the employer might be liable in damages if the discharge was accompanied by special features giving use to an independent cause of action.

In *Dugue* v. *Levy* (1904) 114 La. Ann. 21, 37 So. 995, it was held that an employer who had discharged an architect did not owe him anything for remote and consequential losses, such as the loss of reputation and loss of profits on other business. It was observed that, if the defendant had been guilty of any tortious behaviour towards the plaintiff, in word or in act, and the plaintiff had suffered damages therefrom in respect to his reputation or financial credit, another question would be presented. Such a loss would lie outside the contract, and possibly give rise to an action ex delicto; but it was not within the purview of the Louisiana Civil Code, Art. 2765, which empowers a proprietor to cancel a bargain at pleasure upon paying the "undertaker" the expense and labour already incurred, and such damages as the nature of the case may require.

In *Westwater* v. *Rector, etc., of Grace Church* (1903) 73 Pac. 1055, 140 Cal. 339, decided with reference to the California Civil Code, §§ 3300, 3301, providing that for breach of an obligation arising from contract the measure of damages is the amount which will compensate the party aggrieved for all detriment proximately caused thereby, and that no damages can be recovered which are not clearly ascertainable in both their nature and origin, it was held that a singer discharged from her employment without notice, in violation of her contract, could not recover damages for injury to her health, or to her feelings or reputation, by reason of such discharge.

[2] See especially *Walton* v. *Tucker*, and *Lee* v. *Hill*, ubi supra.

not be permitted in any jurisdiction in which the distinction between forms of action has been abolished. But presumably it is not allowable in any jurisdiction in which that distinction is still preserved[3].

In one case it was laid down that an apprentice who had been dismissed on the ground of misconduct of which he was not proved to have been guilty was entitled to recover for "all the damages flowing naturally from the breach," and that among the elements of damage, the jury might take into account the difficulty which an apprentice discharged for misconduct would have in obtaining employment[4]. This decision, as has been pointed out by an Australian judge, is not a specific authority for the doctrine that damages for loss of reputation are recoverable[5]. But the virtual effect of the doctrine thus propounded seems to be in some instances to enable a wrongfully dismissed servant to recover indirectly, under a general claim for damages, that compensation for impairment of reputation which he is not allowed to recover directly except under a special count. That enhancement of the difficulty of procuring other employment which is recognized as being a proximite consequence of

[3] In *Comerford* v. *West End Street R. Co.* (1894) 164 Mass. 13, 41 N.E. 59, one count of the declaration alleged that the defendant falsely accused the plaintiff of larceny by words substantially as follows: "He is discharged from the employ of this company for misuse of passenger checks." Another count alleged that, under the circumstances set forth in the first one, the defendant wantonly dismissed the plaintiff, and falsely and publicly charged him with being dishonest therein. The court was of opinion that, if the latter count was to be construed as one for discharging the plaintiff under such circumstances as to impute to him a charge of dishonesty, it must fail, for the reason that an action of tort did not lie against an employer for wrongfully discharging an employé. The reason thus assigned would, it is clear, not have been decisive in the view of the judges who decided *Walton* v. *Tucker*, note 1, supra. The count condemned would by them have treated as one for special damages resulting from the plaintiff's dismissal.

[4] *Maw* v. *Jones* (1890) 25 Q.B.D. 107.

[5] Pring, J., in *Kelmar* v. *Souden* (1902) 2 New So. Wales St. Rep. 348, 19 N.W. 235. The other two judges declined to express a definite opinion on the point.

the dismissal is itself the result of the unwillingness of employers to hire a servant who, in the judgment of one person at least, has been guilty of improper conduct. It seems impossible to deny that an unwillingness traceable to such a cause is to all intents and purposes an unwillingness created by an impairment of the servant's reputation. The conclusion to which these considerations point is that a court which views the increased difficulty of obtaining employment which the servant will encounter on account of his dismissal as an element to be considered in estimating his damages is adopting a doctrine which, so far as the measure of compensation is concerned, is equivalent to one which would permit him to recover damages on the specific ground of a loss of reputation arising from the dismissal. But this conception of the situation is pertinent only in jurisdictions in which the assessment of damages with reference to the period subsequent to the trial is permitted. In computing the damages for the period preceding the trial the difficulty of obtaining employment is material only in so far as it bears upon the question whether the servant has exercised due diligence in seeking another position.

5. Loss of property or of personal freedom.—Where a seaman had exercised his right to abandon his ship at a foreign port on account of its being there converted to a purpose which would not only have subjected him to a material increase of risks, but also made him a participant in an illegal voyage, and had afterwards been imprisoned as a deserter by the local authorities at the port, it was held that damages for the imprisonment and the loss of his clothes which had been carried away on the ship while he was in prison were too remote to be recoverable[1]. The authority of this decision is weakened by the fact that it was not concurred in by the whole court; and the question involved may perhaps be regarded as being still an open one.

In a case where a seaman was left by the master in a foreign port it was held that the owner was liable for the loss of his

[1] *Burton* v. *Pinkerton* (1867) L.R. 2 Ex. Ch. 340 (Kelly, C.B., dissented).

clothes, though they had not been converted by the master, but had simply been left exposed, until they were destroyed[2].

In assessing the damages of a servant who, upon being dismissed, is required to leave a house which he had been permitted by his master to occupy rent free, the jury cannot take into account the value of personal property stolen owing to his own remissness in not securing it after his master had exercised his right of removing it from the house[3].

6. Loss of valuable privileges or opportunities incident to the servant's tenure of the employment.—Where a servant whose remuneration consists partly in the enjoyment of a license to occupy premises belonging to his master, with or without other privileges, is required to leave those premises after his dismissal, damages may be recovered for the deprivation of the license and incidental privileges thus granted, provided that specific evidence of their value is given[1]. If the action is tried before

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[2] *Hunt* v. *Colburn* (1853) 1 Sprague 215, citing *Hutchinson* v. *Coombs* (1840) Ware 65.

A servant engaged for a year, to be compensated by a specified salary and a suit of clothes, may, if wrongfully turned away within the year, maintain an action for damages for being prevented from becoming entitled to the clothes; but he cannot maintain trover for the clothes. *Crocker* v. *Molyneux* (1828) 3 Car. & P. 470.

[3] *Lake* v. *Campbell* (1862) 5 L.T.N.S. 582. Upon the refusal of the plaintiff to leave the house, the defendant had removed his goods and furniture into a barn, from which the plaintiff might have taken them if he had chosen to do so. During the time that the goods were there the barn was broken into, and some of the goods damaged, and £70 taken from a bureau.

[1] *Fulton* v. *Heffelfinger* (1899) 54 N.E. 1079, 23 Ind. App. 104; *Odell* v. *Webendorfer* (1900) 64 N.Y. Supp. 451, 50 App. Div. 579, (held to be error to permit jury to consider an assessment of damages use of house rent free, use of house, etc., there being no evidence as to value).

Where a person was employed for a specified period, and given, as part remuneration for his services, the use of a house, and food for himself and family, the testimony of a witness as to what the house and living expenses were worth to him is competent as furnishing a proper basis for a part of the damages, and is not subject to objection as embodying a conclusion of the witness. *Western Union Beef Co.* v. *Kirchevalle* (1895) (Tex. Civ. App.) 26 S.W. 147.

the expiration of the term in a jurisdiction where damages are assessable prospectively for the portion of the term subsequent to the trial, a sum equal to the rent and the value of the other accompanying privileges, if any, for the residue of the term should be allowed [2].

The value of the servant's board and lodging should be assessed as a part of his damages in any case where he is entitled to them under the contract [3].

Contingent advantages of a commercial nature, but of an uncertain value, which the servant would have derived from his employment if he had been allowed to enter on his duties constitute damages too remote and speculative to be recovered [4].

7. Personal expenses.—The allowance of personal expenses as one of the items of the damages of a wrongfully dismissed employé will not be discussed in this article, in so far as it depends upon the question whether it was an express or implied stipula-

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Where a man employed by another as a farm hand at monthly wages, with the use of a house, garden, etc., and pasture for a cow, was discharged and required to quit the premises before the expiration of the agreed term, it was held an allowance to the discharged employé of compensation on the basis of the difference between the contract price per month and what the employé was enabled to earn, plus what he had to pay for house rent, was proper where the circumstances were such that it might be inferred that the rental value of the house given up was as great as that of the house taken. *Hessel* v. *Thompson* (1898) 65 Ill. App. 44.

[2] *Re English Joint Stock Bank* (1876) L.R. 4 Eq. 350.

[3] *Sphan* v. *Williams*, 1 Penn. (Del.) 125, 39 Atl. 787.

[4] Where a merchant employed a clerk for four months, agreeing to sell him goods for his use at wholesale prices during the term of his employment, but refused to allow him to enter on his duties, it was held that the clerk could not immediately recover the difference between the wholesale and retail prices of goods which he would probably have bought had he entered the merchant's service. *Harris* v. *Moss* (1900) 37 S.E. 123, 112 Ga. 75.

A salesman employed on commission, cannot recover damages for loss of sales on goods which he was to sell for other parties on commission in connection with the employer's goods, where such additional service did not enter into the contract of employment, but was an independent agreement on his part. *Wiley* v. *California Hosiery Co.* (Cal. 1893) 32 Pac. 522.

tion of the contract that those expenses should be defrayed by the employer. Whenever that question is involved, the amount of the servant's expenses represents essentially a portion of the remuneration of the employé, and in the assessment of the damages is considered on the same footing as that portion of the remuneration which is paid by a direct transfer of money or other valuable property. In the present connection it will merely be necessary to state the effect of those decisions which bear directly upon the question of the propriety of allowing such expenses as special damages, on the ground that they were incurred in consequence either of the original formation, or of the subsequent interruption, of the contractual relations between the servant and his master.

With regard to the allowance of an indemnity for the expenses incurred by the servant in travelling to the place where the contract is to be performed there is a conflict of opinion. Some cases proceed upon the broad ground that, as such expenses must in the nature of the case have been within the contemplation of the parties, and are incurred in part performance of the contract, they are properly treated as a portion of the loss occasioned by the defendant's default in refusing to allow the servant to proceed with the stipulated work after his arrival[1]. In another case a position directly opposed to this seems to have been taken[2]. But the circumstances were somewhat peculiar, and possibly the court did not intend to repudiate the general doctrine laid down in the cases just cited. In other cases the propriety of allowing such expenses has been treated as a matter dependent upon the question whether the

[1] This is the ratio decidendi in *Woodbury* v. *Jones* (1862) 44 N.H. 206. In Missouri the allowance of such expenses is held to be proper, although they are not set out in the pleadings, since they are such damages "as may be presumed necessarily to have resulted from the breach of the contract." *Moore* v. *Mountcastle* (1880) 72 Mo. 605.

[2] In *Benziger* v. *Miller* (1873) 50 Ala. 206, while the plaintiff was travelling in a foreign country, with a view to finishing her education her father had made a contract in her behalf with the proprietor of a school for her employment as a teacher. *Held*, that she could not recover, as a part of her damages the expenses of her return journey to her own country.

servant was in the employment of the master from the time that the proposal of the latter was accepted, or only from the time when the performance of the contract was actually commenced [3].

The expenses incurred by a servant in returning home after a wrongful dismissal are not allowed, in the absence of an express stipulation in that regard, or a statutory provision applicable to the particular employment [4].

The preponderance of authority is in favour of the view, that the expenses incurred by a servant in attempting to find

[3] In *Noble* v. *Ames Mfg. Co.* (1873) 112 Mass. 492, the proposal of the defendant to the plaintiff, who was then at a distant place, was embodied in the following words of a letter: "I am ready to offer you a foreman's situation at these works as soon as you get here." This was held to import, not a promise to pay the expenses of the plaintiff's removal or compensation for the time spent in removal, but merely to employ him upon his arrival. It was accordingly declared that the expenses which he had incurred in coming to the place where the employer carried on business had been incurred before the contract took effect and were for this reason not recoverable as a part of the damages. The court distinguished *Tufts* v. *Plymouth Gold Min. Co.*, 14 Allen, 407, upon the ground that in that case the contract of employment included an agreement to pay the expenses of travelling to the place where the work was to be done. The doctrine thus laid down seems to be essentially antagonistic to that applied in the cases cited in note 1, supra. It is scarcely possible to base any valid distinction upon the fact that those cases involved a refusal to accept the plaintiff's services from the very outset, and not a wrongful dismissal after the work had been entered upon.

A ship master employed under a general contract at one place, to go to another and take charge of a vessel, is in the service of the owners as soon as he starts; and, in case of a wrongful discharge, they are bound to repay the expense of his journey. *Woodbury* v. *Brazier* (1861) 48 Me. 302.

[4] In the absence of a special stipulation, the master of a ship who is discharged in a foreign port cannot recover of the owner the expenses of his homeward journey. After the discharge he is no longer in their service, and he cannot rightfully charge them with any of his expenses for the reason that such expenses are not incurred in the prosecution of their business. *Woodbury* v. *Brazier* (1861) 48 Me. 302 (assumpsit by owners of a ship against captain for balance of earnings in his hands). It was pointed out that the rights of seamen under the given circumstances were defined by statute, but not those of a captain.

In *Tufts* v. *Plymouth Gold Min. Co.* (1870) 14 Allen, 407, it was held that one who had been employed to act as agent for a term of years at a

other employment are assessable as a part of the damages recoverable [5].

8. Money paid to obtain the employment from which the plaintiff was dismissed.—In one case where a collector for a society had been dismissed, it was intimated that, if the dismissal was wrongful, the fact of his having paid money to obtain the posi-

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distant place upon a certain salary, could not upon being wrongfully dismissed, recover the expenses of his return home as a distinct item of charge, but that, in estimating the actual loss to which he was subjected by reason of his discharge, the compensation agreed to be paid him might be considered; that from this was to be deducted such sum as, by reasonable effort, he might have obtained for his time; and that, in determining how much he might have obtained for his time, regard might be had to the necessary expenses in reaching a place where he might obtain suitable employment.

[5] This doctrine was adopted in *Pennsylvania Co.* v. *Dolan* (1892) 6 Ind. App. 109, 32 N.E. 802; *Van Winkle* v. *Satterfield* (1891) 58 Ark. 617, 23 L.R.A. 853, 25 S.W. 1113.

In *Atkinson* v. *Fraser* (1852) 5 Rich. L. (S.C.) 519, the expenses incurred by the servant in changing from his original employment to that which he obtained after dismissal were assumed to be an element proper for consideration.

In *Dickinson* v. *Talmage* (1896) 138 Mass. 249, it was held that such expenses, when incurred by a father in obtaining new employment for his minor son, were properly included in the damages in an action by the father for the wrongful discharge of the son, and that this rule was properly applied, even though the son had been emancipated.

In *Tickler* v. *Andrae Mfg. Co.* (1897) 95 Wis. 352, 70 N.W. 292, it was held that the servant could not recover as part of damages the expense of removing himself and his family to another place where he had accepted employment for the purpose of reducing the damages, after finding that he could obtain no employment in the place from which he removed. This decision is essentially inconsistent with the cases cited above, and is in the opinion of the writer, erroneous. If the servant is bound to do his best to procure employment, after he had been dismissed, he must, as it would seem be entitled to use all reasonable means for the attainment of that object, and consequently to incur the expenses of removal to another place after an unsuccessful search for a suitable position in the place where he was working up to the time of the dismissal. This being the situation, the further deduction is apparently inevitable, that such expenses should not be included in an estimate of the sum to be deducted from the amount prima facie recoverable by him, a proposition which for practical purposes is plainly equivalent to asserting that they may properly be added to the damages.

In *Waxelbaum* v. *Limberger* (1888) 78 Ga. 43, 3 S.E. 257, it was held that permitting the plaintiff in the action for damages for a wrongful dis-

tion might be a matter to be considered by the jury with relation to the proper measure of damages [1].

9. Loss of profits sacrificed when plaintiff accepted employment from defendant.—A person who gives up profitable employment and devotes himself to an agency may, in case of the employer's failure to perform stipulations necessary to enable him to succeed therein, recover as part of his damages the profits of his former employment which were lost by withdrawing from it [1].

10. Value of plaintiff's inventions.—On the ground that, except in so far as he may by special stipulations have provided for certain contingencies, a servant is not entitled to recover anything more for a wrongful dismissal than the actual damages resulting from his not being allowed to continue working at the price agreed, it has been held that the damages for the master's breach of a contract, assigning letters patent, and providing for the employment of the assignor by the assignee for a definite period, at a compensation consisting in part of shares of capital stock of the assignee, to be delivered at the end of the term of employment if the assignor shall fulfil his part of the contract, do not include either the value of the patents at the time of the assignment, or the loss resulting from being deprived of the opportunity to develop the patents and thus increase the value of his stock [1].

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charge to prove expenses in endeavouring to obtain other employment, in order to lessen or absorb a set-off claimed by the defendant for the profits or wages made in other employment during the time he had contracted to serve his employer, was, even if erroneous, not a ground for reversal, where the trial judge had as to the condition upon which the verdict should be allowed to stand, required the plaintiff to remit the amount against which the expenses had been set off.

[1] *Elwood* v. *Liverpool, etc., Soc.* (1880) 42 L.T.N.S. 694.

[1] *Mylert* v. *Gas Consumers Ben. Co.* (Sup. Ct. 1890) 26 Abb. N. Cas. 262, 14 N.Y. Supp. 148.

[1] *Crescent Horseshoe & I. Co.* v. *Eynon* (1897) 27 S.E. 935, 95 Va. 151. (evidence as to value of patents, held to be incompetent). Discussing the competence of certain evidence offered as to the value of the patents at the time the defendant in error assigned them, and as to what provision in the

The value of an invention made by the servant and adopted by his master is not competent evidence with regard to the question of damages where by the terms of the contract, the employer was to have the use of any invention made by the servant during the stipulated period of employment[2].

11. Money invested in, or expended so as to benefit the defendant's business.—If the purchase of an interest in the employer's business was made a condition of the appointment of the employé to the position from which he was removed, the jury may, in assessing the damages, take into account any loss that this purchase has entailed[1]. But an employé of an insurance company is not entitled to recover as damages for his dismissal premiums paid by him upon a policy of insurance, if it was no condition of his employment that he should insure his life, and there was no connection between the two contracts[2].

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contract induced him to accept the price named in it for the patents, the court said: "It was wholly immaterial in this action what the patents were worth when assigned, or which of the provisions of the contract induced the defendant in error to enter into it. The rights of the parties were to be determined by the terms of the contract. There is nothing in the contract to justify the contention of the plaintiff that he was entitled to recover the value of the patents at the time he assigned them, or at any other time, because he was not permitted to continue in the service of the defendant company so as to develop the patents, and thus increase the value of his stock."

[2] *Pape* v. *Lathrop* (1897) 18 Ind. App. 633.

[1] *Trimble* v. *Glasgow Flax Spinning Co.* (1868) 5 Sc. L.R. 385 (plaintiff had purchased shares of the defendant company upon being made its manager).

[2] *Laberge* v. *Equitable L. Assur. Soc.* (1895) 24 Can. S.C. 595, Aff'g Que. R. 3 Q.B. 513, which rev'd Que. R. 3 S.C. 334.

PROLIXITY.

Prolixity, or the use of unnecessary words, either in ordinary conversation, in the narration of events, or the stating of an argument, is always objectionable. In the first case it may be merely wearisome to the listeners, but in the others it may mean the loss of valuable time, and, often, the cause of confusion and misunderstanding. It is sometimes merely the indulgence in a habit which should be corrected; sometimes it is resorted to for the purpose of hiding the weak points of a case; sometimes it is due to the weakness of the person who uses it, and who seeks by a flow of words to conceal his real incapacity. In the reports of our Parliamentary debates we have prolixity in every form, and in every degree, and in a very costly form too, not merely in the printing of speeches, which nobody listens to when being delivered, or reads when reproduced by the printer, but in the prolongation of the sessions with all the expenditure involved.

It is, however, proxility in the Courts with which we are concerned; and our attention is drawn to the subject by a recent Rule of Court passed by the Supreme Court of Canada, following the example of the Supreme Court of the United States. This rule is as follows: "Except by leave on special grounds no more than two counsel on each side shall be heard on any appeal, and but one counsel shall be heard in reply. Three hours on each side will be allowed for the argument, and no more, without special leave of the Court. The time thus allowed may be apportioned between the counsel on the same side at their discretion."

The intention, of course, is to prevent unnecessary time being occupied by addresses of counsel. We venture to suggest, however, that the vice of this rule is that upon every argument counsel will feel themselves at liberty to take the three hours which they are allowed. It would be better to educate loquacious barristers into the belief that "Brevity is the soul of wit," and trust to their discretion not to exceed the limits of necessity, common sense and good taste.

No one, except when compelled by the rules of politeness, need listen to the endless iteration of the drawing room bore, or that of the parliamentary bore who thinks it incumbent upon him to say over again, in as many words as he can bring to bear, what has already been said in more forcible terms than his own. But in Court the man who has undertaken the responsibility of conducting a cause, in which the interests of others are concerned, has a right to be heard, and must be listened to, no matter how prolix or prosy he may be. It is for him to judge what it is necessary to say, and say it he must after his own fashion. The judge may protest against his taking up the time of the Court, and may in various ways rebuke him, but stop him he cannot.

In the English Courts very long speeches are the exception, though some are recorded as having lasted for days. Of such long speeches a writer in a recent issue of a leading English journal discussing the subject now under consideration, gives some remarkable instances. After mentioning some causes in which the addresses of counsel had taken from two to five hours in delivery, the writer goes on to say: "But these examples sink into insignificance when compared with the speech of Sir Edward Clarke in the Lake Mines Case, which occupied three and a half days; with a famous speech of Sir John Rigby, which took seven days to complete; and with a remarkable effort of Mr. Robert Wallace, when he was a junior, which began on Monday and was brought to an end, under pressure, on the following Saturday. These were all cases in which the matters to be dealt with were full of perplexity."

In the United States speeches of such length are of frequent occurrence. Counsel there do not feel themselves bound to keep within the record, nor do the judges feel it their duty to restrain the most distant flights of imagination. A trial for murder, such as that which recently took place in New York, becomes a matter of national sensational interest and was dealt with accordingly. Consequently a case which in England, or in this country, would be disposed of in a few hours, occupied

as many weeks, only to result in a disagreement of the jury or in endless appeals. An instance in given in which even an American judge, wearied with the prolixity of a counsel, said to him, when he ventured to express a fear that he was taking up too much time, "Oh, never mind time, but for goodness' sake do not trench upon eternity."

In the article referred to the following remarks are worth quoting: "Counsel, it is sometimes said, are paid to talk. That is obviously true in a certain sense. But it must not be taken literally. If it be, then the heaviest briefs would, on the commercial basis, go to the most loquacious. Far more important, as litigants quickly learn, is the *quality* of a forensic speech than its *length*. This is an elementary lesson which many young counsel never thoroughly learn. As a biographer of Chief Justice North remarked, some talk not so much for the cause they represent as for their own sakes. In other words, they seek the doubtful credit of being notable for enduring eloquence. Hence creeps in the fault of repetition, so common and so irritating. A very humourous illustration of this failing is related by the late Serjeant Robinson. A certain counsel was arguing before four judges, and constantly repeated himself. At length one of the judges testily interposed, 'You have dealt fully with that matter, Mr. ——, four times already.' 'No, my Lord, I think only three; it is a point very difficult to understand, and as there are four of your Lordships, I think I ought, in justice to my client, to dwell upon it once again.' It was under similar annoying circumstances that Mr. Justice Channell, some time ago, interrupted a loquacious counsel with the remark: 'Counsel always seem to think that a judge cannot understand anything unless it is repeated at least ten times. I assure you that I understand it, say, the second or third repetition.'"

This reminds me of a story told of the late Bishop Strachan of Toronto. A deputation from a certain congregation waited upon him to complain of their minister who, they said, had preached the same sermon on three successive Sundays. "And

what was the text," said the Bishop, in his well-known Aberdonian accent. None of the deputation could answer. "Go home," was the reply, "and I will write to Mr. Blank and tell him to preach the same sermon again next Sunday."

Speaking of the duty of counsel the writer referred to says: "After all, the duration of speeches must bear some relation to the importance and difficulties of the cases in hand, and in many matters it would clearly be impossible to present all the facts and all the arguments that may legitimately be directed to them in any given space of time. So long as indulgence is not violated, serious complaint is not heard. As was remarked to the writer by a barrister yesterday, only those who have pondered over a case for many days, searching out its weaknesses and how they can best be met, probing into precedents that tell one way or the other, can appreciate the difficulty of being brief. The fixing of an arbitrary limit to speech would inevitably end in many a case being inadequately presented, and would incur protest from both counsel and litigant."

As was well remarked by Lord Justice Mathew, when speaking of the waste of time by frequent repetition, "In my judgment the arguments most often repeated are the worst; the good ones take care of themselves."

A fine example of the way in which brevity of language may be combined with power of argument, and strength of expression, is to be found in that most brilliant of many brilliant chapters in Macaulay's History, in which he describes the trial of the seven bishops at the close of the reign of James the Second. The charge against the bishops was that a petition which they presented to the King was a false, malicious, and seditious libel. The youngest of the counsel for the defence was John Somers, then unknown to fame, but later known to history as a great lawyer, a great judge, and a great statesman. He was the last to speak for the bishops, and he only spoke for five minutes, but that five minutes' speech established his reputation as a orator and a constitutional lawyer. We quote from Macaulay: "The offence imputed was a false, a malicious,

and a seditious libel. False the paper was not; for every fact which it set forth had been proved from the Journals of Parliament. Malicious the paper was not, for the defendants had not sought an occasion of strife, but had been placed by the Government in such a position that they must either oppose themselves to the royal will, or violate the most sacred obligations of conscience and honour. Seditious the paper was not, for it had not been scattered by the writers among the rabble, but delivered privately into the hands of the King alone; and a libel it was not, but a decent petition such as by the laws of England a subject who thinks himself aggrieved may with propriety present to the Sovereign."

In contrast to this we may refer to a speech addressed many years ago by a Canadian barrister to the Parliament of the then Province of Canada on a question of great national importance. A bill for the abolition of the seignorial tenure in Lower Canada was before the Legislative Assembly, and Mr. Christopher Dunkin, afterwards a member of Parliament, and later a judge, appeared at the bar of the House in opposition to the measure. His speech, in which it was necessary for him to deal with a number of questions, legal, historical, and constitutional, occupied several days, though expressed in as concise a form as the nature and importance of the case permitted.

In the first instance above referred to all details and technicalities had been previously dealt with, and it only remained to present to the Court the great principles which had been arrived at from the evidence before it. The merit of Mr. Somers was that in the most effective words, and in the briefest possible terms, he said what was necessary, and did not allow himself to utter a syllable more.

The merit of Mr. Dunkin was that, having a great mass of details to lay before his audience, he so marshalled them that there was no redundancy of language, no useless repetition, and yet nothing was left out which was essential to his cause. He did not weary his hearers because they felt that they were not called upon to listen to a single statement that was useless

to the argument, that there was nothing said merely for effect, and that there was nothing of that most aggravating form of prolixity, vain repetition.

RUSTICUS.

MARRIED WOMEN'S PROPERTY ACT.

When the Royal assent is given to the new Married Women's Property Act now before the British Parliament, an end will be put, as the *Law Times* tells us, to the "extraordinary position which *Re Harkness and Allsopp's Contract*, 74 L. T. Rep. 652; (1896) 2 Ch. 358, eleven years ago disclosed. Previously to the new Act a married woman could convey her own property, if it was acquired or she was married after the coming into operation of the Married Women's Property Act, 1882, as a feme sole; but if she was a trustee, even if one of many trustees, her husband had to join, and, in the case of freeholds, the deed be acknowledged by her. There were exceptions to this rule, some statutory, and some made by the judges in order to avoid the absurdity of the strict interpretation of the law. As the Act is retrospective, *Re Harkness and Allsopp's Contract* and all the curious learning which was founded on it can now happily be dismissed to the limbo of things to be forgotten."

An amendment similar to that now proposed to be made in England would seem to be required, also, in Ontario. The enabling section of the Married Women's Real Estate Act (R. S. O. c. 165, s. 3), would appear to apply only to a married woman's beneficial interest in real estate. Even as regards personal property held in trust, except as to such as comes within section 10 of R. S. O. c. 163, there would still seem to be a necessity for the husband's concurrence. This as above said is an absurdity. The Law Department of Ontario might with advantage look into this matter.

We notice that for some unexplained reason the English Act is not to come into force until January 1, 1908. It is not clear why there should be this delay. Possibly it may be thought more convenient, as a matter of remembrance, that the change should be made at the beginning of the year.

There is nothing new in the legal proposition that citizens of a municipality have the right to the reasonable use of the streets on their surface and above their surface. Persons or corporations handling the little known agency of electricity, and having also the right to use the streets for its poles and wires have also their rights, but as they handle that most dangerous thing called electricity, they are bound to use the highest measure of skill and care in dealing with it. The rights are correlative, but the difficulty is the application of these rights to particular circumstances. In the case of *Temple* v. *McComb City Electric Co.* (*Miss.*) 42 Sou. Rep. p. 874, it appears that a small boy climbed into a small oak tree on the street and came in contact with an uninsulated wire and was injured thereby. The Court considered that this was just the kind of tree that juveniles would be likely to climb, that small boys are known to be in the habit of climbing on every favourable opportunity, and that the electric light company must be assumed to have known the habits of small boys in this regard. They should therefore have provided some proper safeguard, and not having done so, were liable for the injury sustained.

That judges as well as counsel are only human, and subject to the axiom, humanum est errare, a short experience at the Bar makes manifest. One, who himself now adorns a high judicial position in the Province of Ontario, was once somewhat nonplussed, when arguing a case, by being asked by the presiding judge (now deceased), "What I want to know is this, did his widow survive him?" Another counsel a little sententious perhaps in his manner, but both learned and able, after vainly labouring for some time to convince the Court, was suddenly asked, by one of the judges, "Who was the mother-in-law of the plaintiff?" The startling nature of the question probably threw him off his guard, for he promptly replied: "The mother-in-law of the plaintiff, my Lord, was a man named . . . ." The rest of his answer was lost in a general cackle from the Bar.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

PROBATE—INCORPORATION IN WILL OF UNATTESTED DOCUMENT.

University College of North Wales v. *Taylor* (1907) P. 228. The only question in this case was whether an unattested memorandum had been properly admitted to probate as part of the testator's will. The will was dated the 27th June, 1905, and bequeathed certain legacies for the founding of scholarships and prizes "to be held upon such terms, conditions and subject to such rules and regulations as are contained and specified in any memorandum amongst any papers written or signed by me." Among the testator's papers was a memorandum signed by him and dated March 12, 1905, which was proved by oral testimony to have been in existence at the date of the execution of the will and Barnes, P.P.D., held, that in these circumstances, it was incorporated in the will and had been properly admitted to probate.

PRACTICE—MOTION TO ATTACH FOR NOT ATTENDING FOR EXAMINATION PURSUANT TO ORDER—CONDUCT MONEY.

In re Harvey (1907) P. 239. Barnes, P.P.D., refused to make an order for attachment against a person for not attending to be examined pursuant to an order, no conduct money having been paid or tendered.

CLUB—RULES OF CLUB—POWER TO ALTER RULES—FUNDAMENTAL OBJECTS OF CLUB—GENERAL MEETING—RESOLUTION.

In *Thellusson* v. *Valentia* (1907) 2 Ch. 1 the Court of Appeal (Cozens-Hardy, M.R., and Barnes, P.P.D. and Kennedy, L.J.) have affirmed the judgment of Joyce, J. (1906) 1 Ch. 480 (noted ante, vol. 42, p. 347). The action was brought by the member of a recreation club, in order to have a rule passed at a general meeting of the club, abolishing pigeon shooting, declared invalid and ultra vires. The plaintiff rested his case on the ground that pigeon shooting was one of the purposes for which the club had been originally established, and that the rule in question was in effect an alteration of one of the fundamental objects of the club—but the Court of Appeal agreed with Joyce,

J., that although pigeon shooting was one of the objects for which the club was formed, yet that could not be considered to be any more a fundamental object than any of the other sports mentioned.

ANNUITY—WILL—DIRECTION TO PURCHASE—ANNUITY—DEATH OF ANNUITANT BEFORE PURCHASE OF ANNUITY—RIGHTS OF REPRESENTATIVES OF DECEASED ANNUITANT.

In re Robbins, Robbins v. *Legge* (1907) 2 Ch. 8. The Court of Appeal (Cozens-Hardy, M.R., and Barnes, P.P.D., and Kennedy, L.J.) have unanimously affirmed the judgment of Eady, J., (1906) 2 Ch. 648, holding that where a testator directs by his will the purchase of an annuity, and the annuitant survives the testator, but dies before the purchase is effected, the personal representatives of the deceased annuitant are entitled to be paid the sum which it would have been necessary to pay at the date of the testator's death to purchase the annuity.

LUNATIC—FOREIGN CURATOR—TRANSFER OF ENGLISH STOCKS TO FOREIGN CURATOR OF LUNATIC—DISCRETION.

In re De Larragoiti (1907) 2 Ch. 14. An application was made by the foreign curator of a lunatic resident out of the jurisdiction, for the transfer of certain stocks and shares standing in the lunatic's name in England. It appeared that the lunatic had been so found by a French Court, and, in pursuance of the request of the family council, the applicant had been appointed by the French Court curator, and the family council had authorized him to make the present application which had been approved by the French Court. The lunatic was an American, and prior to his lunacy, had carried on business in Paris, and was a man of considerable wealth, and the transfer of the stocks and shares in question was not required for payment of debts, or maintenance. The Court of Appeal (Cozens-Hardy, M.R., and Kennedy, L.J.) held that the matter was one entirely within the discretion of the Court, and, having regard to all the circumstances, the Court made the order asked.

MORTGAGE—SALE BY MORTGAGEE—SURPLUS PROCEEDS OF MORTGAGED PROPERTY—TRUST FOR MORTGAGOR, "HIS HEIRS OR ASSIGNS"—CONVERSION—REALTY OR PERSONALTY—LUNACY OF MORTGAGOR.

In re Grange, Chadwick v. *Grange* (1907) 2 Ch. 20. The

Court of Appeal (Cozens-Hardy, M.R., and Barnes, P.P.D., and Kennedy, L.J.) have affirmed the judgment of Parker, J. (1907) 1 Ch. 313 (noted, ante, p. 361), holding that though the trust declared by a mortgage of the surplus proceeds of the sale of the mortgaged property after satisfying the claim of the mortgagee was in favour of the mortgagor, "his heirs or assigns," yet upon a sale taking place in the lifetime of the mortgagor a conversion into personalty took place, and though the mortgagor before sale became and died a lunatic, yet the proceeds must be treated as his personal estate.

WILL—CONSTRUCTION—LIFE INTEREST TO WIFE "IF SHE SHALL SO LONG CONTINUE MY WIDOW"—BIGAMOUS MARRIAGE—"WIDOW."

In re Wagstaff, Wagstaff v. *Jalland* (1907) 2 Ch. 35. In this case a testator who had to his knowledge contracted a bigamous marriage, by his will left certain personal estate to his "dear wife Dorothy Josephine Wagstaff," and after making other gifts, left all his residuary estate to his said wife and two others in trust for sale and to invest the proceeds and pay the income to "my said wife during her life if she shall so long continue my widow," and upon her death or marriage in trust for the plaintiff. After the testator's death the pretended wife had confessed to bigamy and had been sentenced, her true husband being still living. As there had been no legal marriage with the testator the plaintiff claimed that the gift to the "wife" during life or widowhood was null and void; but Kekewich, J., held that the words "wife" and "widow" had been used by the testator in a secondary sense, and sufficiently designated the person intended to be benefited though she could not legally claim either designation, and that she was therefore entitled to the life estate until she contracted another marriage subsequent to the death of the testator.

LESSOR AND LESSEE—COVENANT FOR RENEWAL—COSTS OF INVESTIGATING LESSEE'S TITLE.

In re Baylis (1907) 2 Ch. 54. There is one point in this case which deserves attention. By a perpetually renewable lease the lessors covenanted that they would make renewals "at the request, costs and charges of the lessee." The lessors incurred certain costs in investigating the title of applicants for a renewal, which were disallowed on taxation; on appeal, however, Keke-

wich, J., held that the covenant meant that the lessors were to be at no cost, and that, therefore, the lessors were entitled as against the lessees to the costs in question so far as they were reasonably and necessarily incurred.

COMPANY—DIRECTOR—QUALIFICATION SHARES OF DIRECTOR HELD IN TRUST—RIGHT OF CESTUIS QUE TRUST OF SHARES TO CLAIM ACCOUNT OF REMUNERATION RECEIVED BY TRUSTEE AS DIRECTOR.

In re Dover Coalfield Extension (1907) 2 Ch. 76. A somewhat novel attempt was made to compel a director of a company, whose qualification shares were held in trust, to account to the cestuis que trust of the shares for the remuneration he had received as director. The facts were briefly as follows: There were two companies, the D Company and K Company. The D Company purchased shares in the K Company and in order to be represented on the directorate of that company, transferred a thousand shares to one Cousins to qualify him for election. He was accordingly elected and received the ordinary remuneration of a director of the K Company. The D Company having been ordered to be wound up the liquidator claimed that Cousins should account to the D Company for the remuneration he had received as director of the K Company. Warrington, J., however, held that the claim was ill-founded, and that the remuneration was for work done by Cousins, and was not in any sense profit received as holder of the shares.

WILL—PARTNERSHIP—SPECIFIC DEVISE OF PARTNER'S SHARE IN PART OF PARTNERSHIP ASSETS.

In re Holland, Brettell v. *Holland* (1907) 2 Ch. 88. A partner in a solvent partnership by his will devised his share in certain realty belonging to the partnership in trust to sell the same and divide the proceeds between his brother and a niece. A question was raised whether in ascertaining the testator's share in the partnership business the realty in question was to be treated as part of the assets of the partnership, or whether a moiety thereof or the proceeds thereof was effectually disposed of by the devise above referred to. Neville, J., held that, as between the beneficiaries of the testator's estate, there had been an effectual disposition of the testator's share in the realty in question, and that, as the other assets of the partnership were sufficient for the payment of the debts of the partnership, as between the bene-

ficiaries, the realty in question was free from liability to contribute to the partnership debts.

LANDLORD AND TENANT—LEASE BY MORTGAGEE "AS AGENT"—LESSEE'S COVENANT NOT TO SELL OR REMOVE MANURE—COVENANT RUNNING WITH THE LAND.

In *Chapman* v. *Smith* (1907) 2 Ch. 97 the action was to enforce a covenant by a lessee not to remove or sell manure from off the demised premises. The lease in question was made by one Robinson, who was mortgagee of the property, but who also acted as agent of the mortgagor in collecting the rents. Robinson was not in possession when the lease was made and he was described in the lease "as agent hereinafter called the 'landlord.'" Subsequently to the lease he sold and conveyed the property to the plaintiff, who claimed that the covenant in question was one running with the land which he, as assignee of the reversion, was entitled to enforce. The defendant contended that the lease was made by Robinson as agent for the mortgagors and that there was consequently no legal demise; but Parker, J., came to the conclusion that looking at the surrounding circumstances, the use of the word "agent" was not sufficient to prevent the legal estate vested in Robinson from passing, and that the plaintiff as assignee of the reversion was entitled to enforce the covenant.

MORTGAGE—PRIORITY—LEGAL ESTATE—POSTPONEMENT OF LEGAL TITLE—FRAUD—NEGLIGENCE.

Walker v. *Linom* (1907) 2 Ch. 104 is a case which, owing to our system of registration of deeds is not of much direct value, but it may be briefly referred to here as shewing that a trustee of the legal estate who neglects to take reasonable precautions to obtain possession of the title deeds, is liable to be postponed to a subsequent mortgagee. In this case the land in question was conveyed to trustees by way of marriage settlement. Certain deeds were handed over to the trustees, but they neglected to inquire for, and were ignorant that the settlor retained, the conveyance to the settlor himself. After the settlement the settlor mortgaged the property and handed over to the mortgagee the conveyance, and the mortgagee sold the property, both he and the purchaser having no notice of the settlement. The action was brought by the wife against the trustee, the mortgagee and the purchaser from him and the settlor, claiming that the wife under

the settlement was entitled to priority, but Parker, J., held that the leaving of the conveyance in the hands of the settlor was such negligence on the part of the trustees that they and the plaintiff were postponed to the equitable title of the mortgagee and the purchaser from him.

LIQUOR LICENSE ACT—SALE OF LIQUOR BY AGENT—AGENT LICENSED, PRINCIPAL UNLICENSED.

Dunning v. *Owen* (1907) 2 K.B. 237 may be briefly noted. It was a prosecution for selling liquor without a license. The sale was made by the agent of an unlicensed person, but the agent who made the sale was licensed. The magistrate held that no offence had been committed and dismissed the summons; but the Divisional Court (Darling and Phillimore, JJ.) held that he was wrong, and that the principal on whose behalf the sale was made should have been convicted.

INSURANCE—FRAUD OF INSURANCE AGENT—PAYMENTS OF PREMIUMS INDUCED BY FRAUDULENT REPRESENTATIONS OF AGENT—AVOIDANCE OF POLICY—RECOVERY OF PREMIUMS—FAILURE OF CONSIDERATION.

Kettlewell v. *Refuge Assurance Co.* (1907) 2 K.B. 242 was an action to recover premiums paid in respect of a policy on the life of the plaintiff. The plaintiff effected the insurance in question, and obtained a policy from the defendants whereby they in consideration of a weekly premium agreed to pay the plaintiff a certain sum on the death of a third person. After the policy had been in force for a year, the plaintiff proposed to let it lapse, whereupon the defendant's agent, with the view of inducing the plaintiff to continue the payment of the premiums, without any authority from the defendants, represented to the plaintiff, that if she continued to pay the premiums for the further period of four years only, that then she would be entitled to a paid-up policy. Relying on this representation the plaintiff continued the payment of the premiums for four years, and then applied to the defendants for a paid-up policy which was refused. The plaintiff then brought her action to recover the premiums which she had been induced to pay in consequence of the agent's misrepresentation. The defendants contended that there had not been a total failure of consideration inasmuch as the plaintiff had been, during the four years, pro-

tected against the contingency of the life insured dropping, and that therefore the policy could not be treated as void. The County Court judge gave judgment in favour of the plaintiff, and on appeal the Divisional Court (Phillimore and Bray, JJ.) affirmed his decision. That Court held that the policy was void at the plaintiff's option, and that she was entitled to exercise that option whenever she discovered the fraud, and that her right to do so was not affected by the fact that in the meantime the contract had been binding on the defendants: also, that though the representations of the agent were made without authority, they were nevertheless as to a matter within the scope of the agent's authority, and the defendants could not retain any benefit resulting to them from such misrepresentation.

INSURANCE—WARRANTY OF FREEDOM FROM CAPTURE—CAPTURE OF SHIP—CONDEMNATION—TITLE OF CAPTORS.

Andersen v. *Martin* (1907) 2 K.B. 248, was an action to recover on a policy of marine insurance. The policy excepted inter alia the loss of the vessel by capture. The vessel had, in fact, been captured by a belligerent, but after her capture, and before her condemnation by a Prize Court, she became a total wreck. The vessel was subsequently condemned as a prize, by a Prize Court, and Channell, J., held that though the capture of a vessel does not of itself divest the owner's property in her, yet upon the ship being subsequently condemned by a Prize Court, the title of the captors relates back to the time of the capture, and consequently the plaintiff was not entitled to judgment.

PRACTICE—JOINDER OF SEVERAL CAUSES OF ACTION—PAYMENT OF LUMP SUM INTO COURT—RULE 123—(ONT. RULE 185).

Benning v. *The Ilford Gas Co.* (1907) 2 K.B. 290 was an action by several plaintiffs claiming relief for injuries arising out of the same transaction, viz., the obstruction by defendants of a stream or water course. The action was constituted under Rule 123, (Ont. Rule 185). The defendants paid into Court a lump sum of £100 in satisfaction of the claims of all the plaintiffs. The aggregate of the plaintiffs' claims was £1,115 15s. The action was tried before a referee who treated the payment into Court as valid and assessed the aggregate damages of the plaintiffs at £79 10s. And he found that the payment into Court was more than sufficient to satisfy the plaintiffs' claims. He

accordingly gave judgment for the defendant with costs up to the date of payment into Court less the costs of the plaintiffs up to that date.. The plaintiffs appealed, on the ground that the referee ought not to have treated the payment into Court as properly made because the defendants did not specify particularly how much of the £100 was paid in respect of each of the plaintiffs' claims but the Divisional Court (Darling and Phillimore, JJ.) held that the payment was regular, and if plaintiffs felt embarrased by it, their remedy was to obtain particulars of the payment.

CRIMINAL LAW—SUMMARY JURISDICTION—"COMPLAINT BY OR ON BEHALF OF PARTY AGGRIEVED"—OFFENCE AGAINST PERSON—INJURED PARTLY DISABLED FROM ACTING.

In *Pickering* v. *Willoughby* (1907) 2 K.B. 296 the Divisional Court (Lord Alverstone, C.J., and Darling and Phillimore, JJ.) held that where a person is unlawfully assaulted and beaten, and is so old and infirm and so much under the control of the assailant as to be unable to institute or authorize proceedings for the prosecution of the offender, an information laid by a relative of the injured person in respect of the assault is a complaint "on behalf of the party aggrieved" within a statute authorizing justices to exercise jurisdiction on complaint made "by or on behalf of the party aggrieved"; and that the assailant had been properly convicted on such information.

ELECTION PETITION—BALLOT PAPER—MARKING BALLOT—POSITION OF VOTER'S MARK.

In Pontardawe Rural District Election (1907) 2 K.B. 313 the Divisional Court (Ridley and Phillimore, JJ.) held that a ballot paper is not rendered void under the Ballot Act, 1872, because the voter has placed his mark thereon outside the ruled compartments on the paper intended to receive the voter's mark; provided that the name is opposite the name of a candidate, so as to leave no doubt for whom the voter intended to vote.

TRESPASS—DAMAGES—REMOTENESS—FOWLS STRAYING ON HIGHWAY—DAMAGE TO BICYCLIST—LIABILITY OF OWNER.

Hadwell v. *Righton* (1907) 2 K.B. 345. This was an action brought by the plaintiff to recover damages from the defendant

in the following circumstances. The plaintiff was travelling along a highway on a bicycle, the defendant's chickens had, as the custom of chickens is in rural parts, escaped from his premises and were quietly pursuing their way along the road, when as the plaintiff approached a dog owned by some other person suddenly darted out and frightened the chickens, and in the confusion one of the chickens flew into the wheel of the plaintiff's bicycle, and upset the plaintiff and damaged his wheel for which he claimed to recover compensation from the defendant; but the Divisional Court (Phillimore and Bray, JJ.) agreed with the judge of the County Court that the damages were too remote, following *Cox* v. *Burbidge*, 13 C.B. (N.S.) 430, and they held that the damage occasioned was not what could be reasonably apprehended from suffering chickens to go upon the highway—as the chickens would have done no harm but for the wrongful act of the dog.

NUISANCE—TRADE DISTRICT—NOISY NEIGHBOURHOOD—PRINTING MACHINERY—INCREASE OF NOISE—RESIDENCE—INJUNCTION.

In *Polsue* v. *Rushmer* (1907) A.C. 121 the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James, Robertson, and Atkinson) have affirmed the judgment of the Court of Appeal (1906) 1 Ch. 234 (noted ante, vol. 42, p. 335). The appeal was brought on the ground, as the appellants contended, that the Court below had failed to take into account the fact that the neighbourhood was a noisy one due to the presence of other manufacturing establishments besides the defendants, and that the plaintiff was not entitled to insist on the same amount of comfort and freedom from noise as in a quiet neighbourhood. Their Lordships, however, thought that on the facts the injunction was rightly granted and dismissed the appeal.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT.

Burbidge, J.] MONTGOMERY *v.* THE KING. [April 15.

Tort by Crown's servants—Diversion of flowing water—Liability—Amendment of petition of right.

The suppliant, by his petition of right alleged, in substance, that the Crown through the Minister of Railways and Canals, and his servants, agents, and employees, having no right to do so, had diverted the water of a certain brook which flowed through his property in the Parish of Dalhousie, N.B., and used the same for supplying the engines and locomotives of the Intercolonial Railway and vessels in the harbour of Dalhousie.

Upon argument of objections in law to sufficiency of petition,

Held, that the suppliant's action was laid in tort, that a petition of right would not lie therefor.

Upon an application by the suppliant to amend his petition, the Court declined to grant the same until a draft of the proposed amendments was submitted and the Court had an opportunity of considering how far it was necessary for the suppliant to depart from his original petition.

Magee, for suppliant. *Newcombe*, K.C., for respondent.

Burbidge J.] THE KING *v.* ROGERS. [April 22.

Expropriation—Licensed hotel—Special value of premises to owner arising from liquor license—Compensation.

The Crown expropriated for the purposes of a public work certain premises which the owner used as a hotel licensed to sell liquors. The license was an annual one, but, as the license laws then stood, it could be renewed in favour of the then owner, or in case of his death, of his widow; but no license could be granted to any other person for such premises. If the

owner sold the property it was shewn that the use to which he put it could not be continued.

Held, that while this particular use of the property added nothing to its market or selling value, it enhanced its value to the owner at the time of the expropriation and that such was an element to be considered in determining the amount of compensation to be paid to him for the premises taken.

MacIlreith, and *Tremaine*, for plaintiff. *W. B. A. Ritchie*, and *Tobin*, for defendants.

Burbidge, J.] THE KING *v.* THOMPSON. [April 22.

Expropriation—Foundry—Depreciation in value of machinery and tools by reason of expropriation—Compensation.

Where a building used as a foundry is expropriated for the purposes of a public work, the owner who is unable to find suitable premises elsewhere to carry on his business is entitled to compensation for the depreciation in value of the machinery, tools and other personal property with which his foundry is fitted up.

MacIlreith, and *Tremaine*, for plaintiff. *McKinnon*, for defendant.

Burbidge, J.] THE KING *v.* STAIRS. [April 22.

Expropriation—Claim for damages for business—Claim for depreciation of value of machinery—Compensation.

Where the whole property is taken and there is no severance the owner is entitled to compensation for the land and property taken, and for such damages as may properly be included in the value of such land and property. He is not entitled to damages because such taking injuriously affects a business which he carries on at some other place.

Defendants, in expropriation proceedings, at the time their premises were taken had them fitted up as a boiler and machine shop. The machinery was treated as personal property by the defendants and sold for less than it was worth to them when used for such purposes,

Held, that they were entitled to compensation for the depreciation in value of the machinery by reason of the taking of the premises where it had been used.

MacIlreith, and *Tremaine*, for plaintiff. *Bell*, for defendant.

Burbidge, J.] SEDGEWICK, *v.* THE KING. [June 10.

Public work—Government railway—Injury to the person—Negligence of Crown's servant—Liability.

The suppliant, while waiting on the platform of the Intercolonial Station at Stellarton, N.S., to board a train, was knocked down by a baggage truck and injured. The truck was being moved by the baggage master. The evidence shewed that the accident could have been prevented by the exercise of ordinary care on the part of the baggage master.

Held, that as the injury of which the supplicant complained was received on a public work and resulted from the negligence of a servant of the Crown while acting within the scope of his duties and employment, the Crown was liable therefor.

Judgment for the suppliant for $600 and costs.

Drysdale, K.C., *Mellish,* K.C., and *Sedgewick,* for suppliant. *MacIlreith,* and *Tremaine,* for respondent.

Burbidge, J.] ARMSTRONG *v.* THE KING. [June 24.

Government railway—Injury to the person—Negligence—Liability of Crown 50-51 *Vict. c.* 16, *s.* 16(*c*)—*Interpretation —Art.* 1056 *C.C.L.C.—Right of Action—Waiver by accepting indemnity.*

The provisions of section 16(c) of 50-51 Vict. c. 16 (now R.S.C. 1906, c. 140, s. 20(*c*)) not only gives exclusive original jurisdiction to the Exchequer Court of Canada to hear and determine claims against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, but imposes a liability upon the Crown to answer in such cases for the wrongful acts of its officers or servants.

The suppliant's husband, in his lifetime a locomotive engineer employed on the Intercolonial Railway, was killed in an accident on the railway while on duty. The accident happened by reason of a fireman, who was employed on another train belonging to the same railway, failing properly to set and lock a switch in the performance of his duty.

Held, that the case fell within the provisions of s. 16(*c*) above mentioned, and that the Crown was liable in damages.

Held (following *Miller* v. *Grand Trunk Ry. Co.,* (1906) A. C. 187, the result of which is to overrule *The Queen* v. *Grenier,* 30 S. C. R. 42), that the right of action conferred by art. 1056 of the Civil Code of Quebec on the widow and relatives of a deceased employee whose death has been caused by negligence for which the employer is responsible, is an independent and personal right of action; and is not, as in the English Act, known as Lord Campbell's Act, conferred on the representatives of the deceased only; and that a provision in a by-law of a society to which the deceased belonged, and to the funds of which the Crown subscribed, that in consideration of such subscription no member of the society or his representatives should have any claim against the Crown for compensation on account of injury or death from accident, did not constitute a good defence to the widow's action.

Laflamme, and *Mitchell,* for suppliant. *Newcombe,* K.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Boyd, C.] PLENDERLEITH *v.* PARSONS. [June 20.

Interest—Mortgage—No provision for interest after maturity—Interest at statutory rate—"Liability"—Meaning of.

63 & 64 Vict. c. 29 (D.), which provides for the statutory rate of interest being five, instead of six per cent., as under the Interest Act, R.S.O. 1886, c. 129, contains the proviso that the Act is not to apply to "liabilities" existing at the time of its passing.

Held, that the proper construction of the word "liabilities" is with reference to interest only.

Where, therefore, in a mortgage, bearing interest at seven p.c. there was no provision for the payment of interest after maturity, no interest by virtue of the mortgage itself would thereafter be payable, and interest would only be allowed by

way of damages, so that no liability existed as to which the proviso would apply, and, therefore, after said maturity interest at the statutory rate of 5 p.c. only was allowable.

Heaslip, for the mortgagor. *Irwin*, K.C., for the mortgagee.

DIVISION COURTS.

FIRST DIVISION COURT—ALGOMA DISTRICT.

ROGERS *v.* DINSMORE.

Woodman's Lien Act, R.S.O. c. 154, *s.* 16, *sub-ss.* 1, 2—*Logs and timber—Lumber.*

No lien attaches on "lumber," that is, *i.e.*, logs or timber sawn into board, scantlings, etc., under the Woodman's Lien Act, which, being an exception to the common law, must be strictly construed.

[Sault St. Marie, O'Connor, J. J., Aug. 15, 1907.

This was an application by certain workmen of the defendant seeking to enforce liens against lumber made, sold and delivered by defendant before their liens were filed to the Simms Lumber Co. It was admitted that the lumber seized under the lien was the product of logs sawn in defendant's mill, and the sole question in dispute was whether any lien attached to the product of the timber or logs after the same had been sawn and converted into lumber.

O'CONNOR, J.J.:—It was contended by counsel for the lienholders that lumber is a species of timber, and that so long as it can be identified as the product of the "logs or timber" in respect of which a lien would attach before being sawn, that the same right existed after being sawn. He quoted sub-s. 2 of s. 16 of the Woodman's Lien Act as authority for this contention from which he urged that if the lumber can be identified, the lien still attaches.

The Woodman's Lien Act was passed for the special benefit of woodmen to enable them to secure their wages in a summary way. It is not in force in any of the counties of Ontario, only

in the districts. It is an exception to the common law and must be strictly construed. See *Dallaire* v. *Gauthier*, Q.R. 24 S.C. 495, Can. An. Digest, 1904, p. 170.

By a strict interpretaion of sub-s. 1 of s. 2 the words "logs or timber" mean and include only what the sub-section defines them to mean, viz.: logs, timber, cedar posts, telegraph poles, railroad ties, tan bark, shingle bolts or staves or any of them, also by amendment of the Act, pulp wood.

I might here note that before the amendment, it had been decided by some of the district judges that pulp wood came within the definition of "logs and timber," and so was subject to the operation of the Act. Nevertheless the Legislature deemed it advisable to amend the Act by having the words "pulp wood" added. It is reasonable to assume that if it was intended to include lumber that it would have been specially named.

Applying the principle of strict construction to the present case, I cannot so far stretch the literal meaning of the Act as to hold that the word "timber" includes boards, planks, scantling, etc., when, if it had been the intention of the Legislature to include these, the word "lumber" would have naturally been inserted in order to express such an intention. Tan bark and shingle bolts are specially named, although, according to the same reasoning employed on behalf of the plaintiff, they might be included in the word "timber." Cordwood might also, according to the same reasoning come within the meaning of the word "timber," but it could not be successfully argued that cordwood is subject to the Act. The only authorities cited all go to shew that when the logs are sawn and converted into lumber the lien ceases to attach.

The case of *Baxter* v. *Kennedy*, 35 N.B. Rep. 179, is directly applicable. In that case it was held that the words "logs and timber" were not intended to include deals and other manufactured lumber. In the absence of any Ontario case deciding the point, I must give effect to the cases cited, and to the language of the statute defining the meaning of the words "logs and timber."

I am of the opinion, therefore, that the liens of the plaintiff and the other lien-holders who have come in and proved their claims against Dinsmore do not attach and cannot be enforced against the lumber seized thereunder belonging to the Simms Lumber Co. This lumber must be released from seizure and the liens vacated and the action dismissed as against the Simms Lum-

ber Co. with costs. The plaintiff and other lien-holders who have proven their claims against Dinsmore will have judgment against him therefor, with costs to include the costs of the liens.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] [July 8.

BLACK *v.* WINNIPEG ELECTRIC RY. CO.

Injunction—Municipality—By-law or resolution—Approval of plans.

Motion to continue an ex parte injunction to prevent the defendants from constructing a loop line on certain streets of the City of Winnipeg which they had been authorized to construct by a resolution of the council, on condition that they should also construct another loop line on certain other streets of the city.

Held, 1. Notwithstanding the provision of s. 472 of the Winnipeg charter that "the powers of the council shall be exercised by by-law when not otherwise authorized or provided for," such an authorization may be given by resolution. *Toronto* v. *Toronto Ry. Co.*, 12 O.L.R. 534, followed.

2. It was not a valid objection to the resolution that it was an approval of a report of the Board of Control, even if such Board had no power to deal with the matter.

3. The council having approved of the construction and of the plan submitted, and the city engineer having also, except in one particular, approved of the details as required by law before construction should begin, it was not a sufficient ground for an injunction that the council had not passed the plans as varied by the engineer.

4. The council had power to give the conditional approval, and the fact that the city might be unable afterwards to enforce the condition would not make that approval void.

A. J. Andrews and *Burbidge*, for plaintiff. *Munson*, K.C., and *Haffner*, for defendants.

Province of British Columbia.

SUPREME COURT.

Martin, J.] REX *v.* FORD. [May 24.

Criminal law—Direction to jury—Assault committed by prisoner to recover money out of which he had been cheated—Whether he is guilty of robbery or assault.

Where the prisoner acted in the bonâ fide belief that he had been swindled, and in the belief that he was entitled to retake the money, committed an assault for that purpose alone, and did retake the money or a portion of it, in that sole and bonâ fide belief, the jury, on consideration of the facts, would be justified in acquitting him on a charge of robbery, although it was open to them, on the same facts, to convict on a charge of assault.

Maclean, K.C., (D. A.-G.), for the Crown. *Howay*, for the prisoner.

Full Court.] [July 22.

EASTERN TOWNSHIPS BANK *v.* VAUGHAN.

Waters and water rights—Riparian owners—Effect on water record of abandonment of pre-emption.

V. and M. held separate pre-emption records, and, as partners, a joint water record dated January, 1888. In October, 1889, they formally abandoned their separate pre-emptions and re-located the same area as partners, obtaining to it in due course a pre-emption record to it in their joint names. The water record was left unchanged, standing in the names of V. and M.

Held, on appeal, reversing the decision of Morrison, J., that when V. and M. abandoned their pre-emptions, the water record obtained in connection therewith lapsed.

S. S. Taylor, K.C., and *Hanington*, for appellants, plaintiffs. *Davis*, K.C., for respondents, defendants.

Flotsam and Jetsam.

Daniel O'Connell was once defending a prisoner indicted for murder. The principal witness against the defendant swore that the prisoner's hat had been found near the place of the murder. The hat was then produced in Court, and the witness swore positively that it was the same one that was found, and that it belonged to the prisoner.

"By virtue of your oath, are you positive that this is the same hat?"

"Yes."

"Did you examine it carefully before you swore that it was the prisoner's?"

"Yes."

"Now, let me see," said O'Connell, as he took up the hat and began carefully to examine the inside of it. He paused with a curious expression on his face, and then spelled aloud, "'J-a-m-e-s.' Now, do you mean to say that that name was in the hat when you found it?" he asked, turning to the witness.

"I do."

"Did you see it there?"

"I did."

"And this is the same hat?"

"Yes."

"Now, my Lord," said the lawyer, turning to the Judge, "there's an end to this case. There is no name whatever within this hat."

The prisoner was instantly acquitted.

LONG DISTANCE JUSTICE.—From Wyoming comes a new idea in the administration of the criminal law. On August 10, at the Bear Creek Ranch, some fifty miles from Cheyenne, Albert Bristol pulled Miles Fitzgerald off a mowing machine and dusted the contiguous territory with his person. Fitzgerald thereupon telephoned a complaint to town and a warrant was issued for Bristol's arrest. Hearing of this Bristol also resorted to the telephone, got into communication with the Court, and entered a plea of guilty. The Justice announced a fine of

fifteen dollars and costs over the telephone, and Bristol promised to send a check for the amount by the first mail.—*Law Notes.*

INJURIA SINE DAMNO.—A correspondent writes from St. Louis that a husky Ethiopian recently came into his office, and exhibiting a scalp wound about three inches long on top of his head, wanted to know if he could "git anything foh dis heah." In response to a query from the lawyer he explained: "Well, boss, it was like dis: Ah was wuking down by dis heah new buildin' an' a fo'poun' brick fell off'n de sixteenth story an' hit me smack on top de haid." "It is discouraging to be obliged to add," writes our correspondent, "that a grasping and heartless construction company, although admitting the facts and their liability, refused to pay more than ten dollars, on the ground that the evidence failed to disclose any material damage."

Those who knew the forceful and practical prelate referred to, ante p. 613, will see how true to life is the story there related. Dr. Parkin in his preface to the life of Chief Justice Robinson, the life-long friend of Dr. Strachan, speaks of the latter as "a man whose masculine intellect has left a profound impression upon the educational, ecclesiastical and political life of Upper Canada." Many anecdotes are told of him. One recently related to the writer of the article referred to shewed that "totes" alluded to the other night by that other masterful and genial prelate, the Bishop of London, were not as common amongst the clergy in Bishop Strachan's time as they are now. Some one told him that one of the clergymen in his diocese was too fond of his toddy, alleging that he bought his whiskey by the gallon. "Hoots, mon," answered the Bishop, "more fule he, I buy mine by the bar-r-el."

Canada Law Journal.

VOL. XLIII. OCTOBER 15. NO. 20.

BILLS OF LADING.

A condition of things exists in connection with railway traffic in this Dominion which is as extraordinary as it is objectionable. It is probably not known to the public, that, (1) since Oct. 17, 1904, the forms and conditions of four railway companies, then in use and produced to the Board of Railway Commissioners under the Railway Act, have been declared legal and binding upon the public by what amounts to statutory authority; whilst those in use by all other companies in Canada remain unaltered in that respect, and subject to dispute, and may be judicially declared to be illegal and valueless. (2) That the forms and conditions so declared to be legal and binding on the public have apparently been so declared without examination or consideration.

The four railway companies above referred to are the Grand Trunk Ry. Co., the Canadian Pacific Ry. Co., the Canadian Northern Ry. Co., and the Pere Marquette Ry. Co.

On the 17th of October, 1904, a far reaching order was made by the Board of Railway Commissioners. It recites "that the above named companies brought to the Board their forms of bills of lading and other traffic forms, in compliance with s. 275, sub-ss. 1, 2 of the Railway Act, 1903; that these companies are the only railway companies in Canada which have, up to the present moment, complied with the statute; that there is much diversity in the forms of the several railways; that the whole subject is of very great importance and will require that much circumspection should be exercised in examining into the contracts and forms which the Board hereafter has to approve, and also into the question of limitation and liability on the part of the carriers."

The order goes on to say: "The Board does not deem it

advisable to make any final or definite order upon the subject at present, but is of the opinion that an interim order might properly be made, permitting such railways as have made application therefor to continue the use of their present forms until the Board shall otherwise prescribe and order. It is therefore ordered that the above mentioned applicants do severally have power to use the forms submitted, and they are hereby legally authorized so to do until this Board shall hereafter otherwise order and determine."

By the Railway Act of 1903 the Board was authorized to determine the extent to which the liability of a company in respect to the carriage of traffic might be impaired, restricted or limited by any conditions or regulations made by the company, and the same statute provided that no such condition or regulation would relieve the company from their liability unless it had been first authorized or approved by the order of the Board.

Section 27 of the Railway Act of 1906 provides that all express tolls and tariffs shall also be subject to the regulation or disallowance of the Board.

It will be noticed that the four companies referred to in the order of Oct. 17, 1904, complied with the requirements of the statute in bringing to the Board of Railway Commissioners their traffic forms; and, as will be seen, the forms submitted by these four companies determine the extent of their liability. No order has been made as to the forms or conditions of any other railway company.

It is admitted in the preamble of the order that there is "much diversity in the forms submitted" by the four companies. Presumably there is also much diversity in the forms used by other companies. It is also admitted that the "subject is of very great importance" and that the "much circumspection which should be exercised in examining into the contracts and forms then submitted" has been omitted.

As a matter of public policy, the forms, conditions and liabilities of all railways in the country as to the carriage of

freight should be the same, and they should be subjected to the most careful scrutiny, and the great trade interests of the country should be notified, so that the public might be properly safeguarded, especially in view of the fact that the best legal talent, combined with long experience and clear conception of what is needed in the interests of the carriers, will be present on their behalf.

Whilst this matter should have been attended to long ago, the Board may, possibly with some reason, seek to excuse itself on the ground of the pressure of the work in relation to other matters of great importance in various parts of the Dominion. If this means that the Board as at present constituted is not equal to the strain of work laid upon it, the necessary changes must be made in its personnel, or more members must be added to the Board, for it may be safely said that it is almost the most important court of justice in the Dominion, as well as being a marked factor in its trade relations.

It must also be remembered that at least two members of the Board must be on circuit almost continuously, hearing and deciding railway matters from the Atlantic to the Pacific. Other work devolves upon the remaining Commissioner, usually the Deputy Chief Commissioner, the Hon. Mr. Bernier, who stays in Ottawa for that purpose. Cases of sudden emergency, as well as more routine matters, naturally come before him. Without disparagement important matters should not, and in fact do not, come before this single judge. Parties naturally desire the opinion of a majority, or the whole of the Board, and especially look to the Chief Commissioner whose legal and judicial training and experience in railway litigation, added to other qualifications, make him almost a necessity in the consideration and adjudication of important matters, such as for example the very questions above referred to.

DOMINION STATUTES, 1907.

The yearly volume of the Statutes of Canada (6-7 Edw. VII.) has been issued by the King's printer. It contains the first amendments which have been made to the Revised Statutes, as well as the repeal and re-enactment of many of those Acts.

Much new legislation also appears. Of this may be mentioned the Acts relating to Dominion Lands Surveys, Electricity and Fluid Exportation, Industrial Disputes Investigation (Lemieux Act) and the Treaty between Canada and Japan. Of Revised Statutes repealed and re-enacted, we find the Customs Tariff, Electricity Inspection Act and Geology and Mines Act (creating a Department of Mines).

We would call attention to the index to the Public General Acts. This now occupies some sixteen pages of analytical reference, and is in the same form as the index to the Revised Statutes. The latter we consider the best analytical index to be found in any volume of statutes, every possible subject matter being indexed, as well as each separate Act being alphabetically analysed. The references are in every case to the chapter, section and paragraph, instead of following the old style of reference to pages. That this index comprises some 420 pages is a partial indication of its extent and thoroughness.

Both of the indices mentioned were compiled by Mr. F. A. McCord, Parliamentary Counsel and Law Clerk of the House of Commons. We congratulate Mr. McCord on his valuable work, and gratefully acknowledge the service he has thereby rendered to the profession and the public.

An exceptionally good appointment to the Bench is the promotion of Mr. Nicholas D. Beck, K.C., of Edmonton, to the Supreme Court of the Province of Alberta. Mr. Beck was called to the Bar of Ontario in 1879, and was an LL.D. of the Toronto University. He practised his profession first at Peterboro' and subsequently at Winnipeg, Calgary and Edmon-

ton, going to the latter place in 1891, when appointed Crown prosecutor. He was given silk in 1893. A highly respected member of the Bar, and its acknowledged leader in the North-West Territories, he was chosen president of the Law Society where he did good service for the Bar. It is much to be deplored that other men in other parts of the Dominion, occupying the same high position in the profession as Mr. Beck, are not willing as he was to give up their large professional income for the good of the country. This difficulty, however, lies mainly at the door of the Government in not providing salaries commisurate with what ought to be the dignity of the position.

The Canada Gazette of August 31 and September 21 contain proclamations by the Governor-General in Council, whereby the statute, 6-7 Edw. VII. c. 45, in respect to the Provinces of Saskatchewan and Alberta came into force on September 16th last; and on that day the judges of the Supreme Court of the North-West Territories were assigned to the Supreme Court of their respective provinces as follows: Hon. E. L. Wetmore, to be Chief Justice of Saskatchewan, and Hon. J. E. P. Prendergast, Hon. H. W. Newlands, and Hon. T. C. Johnstone, to be Justices of the Supreme Court of that province. As to the Province of Alberta, Hon. A. L. Sifton becomes Chief Justice, and Hon. D. L. Scott, Hon. Horace Harvey and Hon. C. A. Stuart. Puisne Judges of the Supreme Court of Alberta.

PROVINCIAL POWER TO INCORPORATE COMPANIES.

In the recent argument before the Supreme Court in *Canadian Pacific Ry. Co.* v. *Ottawa Fire Insurance Co.* it was claimed for the provinces that they had power to incorporate all companies over whose operation they had legislative jurisdiction, and that such companies might be authorized to do business anywhere. In other words, that jurisdiction over the affairs of

the company determined the power to incorporate. One of the arguments urged against this view was that the application of it to our own constitution was impossible. If exclusive jurisdiction had been given to the Dominion over certain subjects and to the provinces over others, the theory would work; but in the early case of *Hodge* v. *The Queen*, the Privy Council declared that "subjects which in one aspect and for one purpose fall within section 92 may, in another aspect and for another purpose, fall within section 91." In order to illustrate the extent to which this view of the constitution had been established by the cases, a list of them, with an explanatory table, was prepared and referred to on the argument. These are now reproduced(*a*) as they may be useful for reference. An explanation of the table is given on the following page.

(*a*) The following is the list of cases; the table is on p. 640.

1. *L'Union St. Jacques de Montreal* v. *Belisle* (1874), L.R. 6 P.C. 31. Legislature may pass an Act for the relief of a company in financial embarrassment to avert insolvency.

2. *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409. Parliament may declare judgment of Court of Appeal in matters of insolvency final and not subject to right of appeal given by provincial statute.

3. *Peek* v. *Shields* (1881), 6 Ont. App. Rep. Parliament may interfere with property and civil rights and civil procedure in passing Insolvent Act, 1875.

4. *Shoolbred* v. *Clarke* (1890), 17 S.C.R. 265. Parliament may pass Winding-Up Act affecting provincial companies.

5 and 6. *Clarkson* v. *Ontario Bank*, *Edgar* v. *Central Bank* (1888), 15 Ont. App. Rep. 166; *Atty.-Gen. Ont.* v. *Atty.-Gen. Dom.* (1894), A. C. 189. Legislature may pass Assignments and Preferences Act, when there is no Dominion Act of Bankruptcy and Insolvency.

7. *Quirt* v. *Queen* (1891), 19 S.C.R. 510. Parliament may legislate respecting the property of an insolvent bank.

8. *Regina* v. *Boardman* (1871), 30 U.C.R. 553. Legislature may prescribe penalties in regulations for tavern and shop licenses.

9. *Hodge* v. *Queen* (1883), 9 App. Cas. 117. Legislature may make police regulations for taverns.

10. *Poulin* v. *Corporation of Quebec* (1884), 9 S.C.R. 185. Legislature may prohibit sale of liquor on Sunday.

11 and 12. *Atty.-Gen. Ont.* v. *Atty.-Gen. Dom.* (1896), A.C. 348; *Atty.-Gen. of Manitoba* v. *Man. License Holders' Assn.* (1902), A.C. 73. Legislature may prohibit liquor traffic within the Province.

13. *Brewers and Maltsters Assn. of Ont.* v. *Atty.-Gen. Ont.* (1897), A.C. 231. Legislature may issue licenses to brewers and distillers to sell wholesale within the Province.

14. *Russell* v. *Regina* (1882), 7 App. Cas. 829. Parliament may suppress liquor traffic throughout the Dominion.

By following the horizontal and vertical columns to the squares in which they meet, the cases will be found in which it has been held that the Dominion and Provincial jurisdictions

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15. *Citizens* v. *Parsons* (1881), 7 App. Cas. 96. Legislature may regulate contracts of fire insurance made by Dominion companies. Parliament may incorporate companies to do insurance business in more Provinces than one.

16. *Colonial Building & Investment Assn.* v. *Atty.-Gen. Que.*, 9 App. Cas 157. Dominion may incorporate companies to purchase and sell land in more Provinces than one.

17. *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575. Legislatures may tax banks and insurance companies carrying on business within the Province.

18 and 19. *Smith* v. *Merchants Bank* (1881), 28 Gr. 629; *Tennant* v. *Union Bank* (1894), A.C. 31. Parliament may legislate regarding transfer of warehouse receipts to banks.

20. *Fortier* v. *Lambe* (1894), 25 S.C.R. 422. Quebec Legislature may tax manufacturers and traders in the City of Montreal by imposing a license fee.

21. *Longueil Nav. Co.* v. *Montreal* (1888), 15 S.C.R. 566. Legislature may authorize municipalities to tax ferrymen and ferries.

22. *Dinner* v. *Humberstone* (1896), 26 S.C.R. 252. A Legislature can charter a ferry within its geographical limits.

23. *In re International and Interprovincial Ferries* (1905), 36 S.C.R. 206. Parliament can establish ferries between two Provinces or between a Province and any British or foreign country.

24. *C.P.R.* v. *Bonsecours* (1899), A.C. 367. Parliament has exclusive power to regulate the construction, repair and alteration of a Dominion railway. Legislature cannot interfere with the structure, but may prescribe for the cleaning of a railway ditch. But see *Madden* v. *Nelson*, *ibid.* p. 626. Legislature cannot impose liability for cattle killed on Dominion railway.

25. *G.T.R. Co.* v. *Atty.-Gen.* (1907), A.C. 65. Parliament may prohibit Dominion railways from "contracting out" of liability for injuries to employees.

26. *Canada Southern Ry. Co.* v. *Jackson* (1890), 17 S.C.R. 316. Workmen's Compensation Act (provincial) applies to Dominion railways.

27. *Cunningham and Atty.-Gen. B.C.* v. *Tomey Homma and Atty.-Gen. Dom.* (1903), A.C. 151. Parliament has exclusive jurisdiction as to naturalization, but Legislature can determine what privileges should be attached to it.

28. *Union Colliery Co.* v. *Bryden* (1899), A.C. 580. B.C. Legislature may not prohibit Chinamen (aliens or naturalized) from employment in mines.

29. *Regina* v. *Wason* (1890), 17 A.R. 221. Legislatures in passing Act providing against frauds in supplying milk to cheese and butter manufactories may prescribe penalties for its enforcement.

30. *Regina* v. *Bradshaw* (1876), 38 U.C.Q.B. 564. Parliament may provide for parties dispensing with a jury in appeals from summary convictions.

31. *Atty.-Gen.* v. *Atty.-Gen.* (1898), A.C. 700. Provinces own the fish, but fishing regulations may be made by the Dominion.

overlap and encroach one upon the other in respect of the subjects of legislation indicated in the horizontal and vertical headings respectively(*b*).

(*b*) Table of cases above cited, under their appropriate headings.

Provincial Jurisdiction Sec. 92.	Dominion Jurisdiction, Sec. 91.											
	2. Trade and Commerce.	2b. Temperance Legislation.	3. Taxation.	13. Ferries.	21. Bankruptcy and Insolvency.	25. Naturalization & Aliens.	27. Criminal Law.	Companies. (1) Dom. Rys. (s.s. 29).	Companies. (2) Banks (s.s. 15).	Companies. (3 Other Coys. Sec. 91.	Peace, Order and Good Govmt.	Fisheries.
1. Amendment of Constitution						27						
2. Direct Taxation	13, 17 20			21								
8. Municipal Institutions	9, 10	9, 10 11, 12		.		.		24				
9 Licenses for Revenue	13						8					
10. Local Works						28		24			11	
11. Provincial Companies					4							
13. Property and Civil Rights	11, 18 15, 29	14			2, 3, 5 6, 19, 7	28	30 29	26 25	18 19 7	15 16		
14. Administration of Justice, Civil Procedure, Provincial Courts							22					
5. Punishments to enforce Provincial Law	9, 29	9					8					
16. Matters of Local or Private Nature in the Province	9, 10 11, 12	9, 10 11, 12		22	1, 6 7		8	24			11, 12	
Sec. 109, Royalties				23								
Fisheries												31

"Ambulance chasers" having received judicial notice recently at Osgoode Hall, in a case, which, by the way, had nothing to do with that wart on the profession, reminds us of an anecdote worth repeating especially as another obnoxious character known as a "claims agent" also appears therein. The wife of a workman on a railway early one morning was called on by a claims agent, who suggested settling with her on behalf of the company for all damages for the loss of her late lamented spouse. She was somewhat mystified as this bread winner was upstairs sleeping off his booze of the night before; but, being offered $90 if she would sign a paper, she did not feel like refusing so welcome an addition to her uncertain livelihood. The claims agent had scarcely left the house when hot foot came a pettifogging solicitor who also wanted her signature to another paper. But there was no offer of money this time. This suggested a train of thought; if the first man was willing to give money for her signature why should not this man do the same? Negotiations being opened on that basis a smaller sum in cash was agreed to and paid, and No. 2 departed. Soon after another person of the same class appeared and wanted her name to another paper, with prospects of untold wealth dangled before her bewildered mind. She pulled herself together and seeing the tide apparently "leading on to fortune" again entered into negotiations and finally signed his paper, after a plucky and successful fight for an increased sum, which was also duly paid. Each of these solicitors then demanded compensation from the company. It is not related whether there were any further propositions of the same sort; but a few days after the solicitor of the railway company who apparently had begun to "smell a rat" enquired into the matter, and it turned out that the "late lamented" had sold his pass on the railway to another man for several drinks. This unfortunate went on a short trip on the strength of the pass; but the only name on his person when taken out of the wreck was the name on the pass.—Hence these tears!

Anarchy even though it is not always caused by a lax administration of the law is very commonly a result thereof. The tragedy at Wiarton is another illustration of the disastrous results of men taking the law into their own hands, which is a species of anarchy. Four men sought to do that which presumably should have been done by the local police authorities, with the result that one of them was shot dead by the woman whose house was being raided, and the other three have been promptly sentenced to eight months in the common jail for their participation in the attack. Chief Justice Mulock was perfectly right in the course he took. He would have been very lax in his administration of justice had he failed to pronounce a substantial sentence upon men who had thus been partakers in a very serious offence. As has been very frequently said of late, anarchy is in the air, and evidences of this are of daily occurrence. The well-being of the country depends upon the prompt repression of any exhibitions of this growing evil.

The State of New York has made a new departure by enacting that adultery is indictable as a criminal offence. The statute came into force on 1st September last. A contemporary does not think this a happy inspiration on the part of the legislature and prophesies that it will give rise to prosecution instituted not to vindicate the law and outraged morals, but to gratify private revenge. As the writer wisely says, "There are some wrongs which are best left to be dealt with by the healthy public sentiment of the people. If public morals are so debased as to excuse the wrong, it is not by legislation such as this that a reform can be effected." The statute, however, is an experiment, whose results will be watched with interest.

REVIEW OF CURRENT ENGLISH CASES.

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BILL OF LADING—THROUGH FREIGHT—LOSS OF PART OF CONSIGNMENT IN TRANSIT—LIEN ON GOODS DELIVERED IN RESPECT OF FREIGHT CHARGES PAID ON GOODS LOST.

The Hibernian (1907) P. 277 was an action by consignees against ship owners to recover certain moneys alleged to have been overcharged by them. The circumstances were as follows: The plaintiffs were consignees of a quantity of bags of flour which had been consigned from Milwaukee partly by railway and partly by the defendants' ship to London for a through freight. In the course of transit part of the goods were damaged and were sold and not delivered. The ship owners paid the railway its charges on this part of the goods as well as on that part actually delivered to the consignees, and under the contract claimed to have a lien on the goods delivered for the railway charges on the undelivered goods. The Divisional Court (Barnes, P.P.D. and Dean, J.) was of the opinion that they were not entitled to any lien on the goods delivered for freight on the undelivered goods; but the Court of Appeal (Lord Alverstone, C.J. and Moulton, and Kennedy, L.JJ.) came to the conclusion that, on the proper construction of the contract, the ship owners had the lien which they claimed. The action therefore failed.

LUNATIC—COMMITTEE AND RECEIVER OF LUNATIC'S ESTATE—RECEIPTS BY RECEIVER AFTER HIS RIGHT TO ACT HAD CEASED—SURETY OF RECEIVER.

In re Walker (1907) 2 Ch. 120. In taking the accounts of a person who had been appointed receiver and committee of a lunatic's estate, it appeared that the receiver had a balance in his hands at the death of the lunatic, and that after the lunatic's death he had received further moneys which were also in his hands, and the question then arose whether a surety for the receiver could be made answerable for these subsequent receipts as well as for the balance in hand at the date of the lunatic's death. The Master held that the surety was liable, but the Court of Appeal (Cozens-Hardy, M.R. and Kennedy, L.J.) held that the receipts subsequent to the death of the lunatic could not

be attributed to him in his character of receiver or committee, and, therefore, his surety could not be made liable in respect thereof.

SOLICITOR—CHARGING ORDER FOR COSTS—PROPERTY PRESERVED—APPOINTMENT OF RECEIVER—RESULT OF ACTION NOT BENEFICIAL—(ONT. RULE 1129)—TRUSTEES—PRIORITY—COSTS.

In re Turner, Wood v. *Turner* (1907) 2 Ch. 126 was an application by the plaintiff's solicitors for a charging order. The action was for administration, and a compromise had been made whereby it was agreed that the costs of all parties were to be paid out of the estate. The plaintiff's solicitors claimed to be entitled to a charging order (Ont. Rule 1129), for their costs. A receiver had been appointed in the action, but in the result the appointment had not proved beneficial to the beneficiaries, nevertheless Kekewich, J., held that the property had been "preserved," and the solicitors were entitled to a charge. It was also held that the trustees of the estate who were defendants were entitled to payment of their costs, charges and expenses, in priority to the charge of the plaintiff's solicitors for their costs.

LANDLORD AND TENANT—DETERMINATION OF TENANCY—TENANCY AT WILL CREATED ON TERMS OF EXPIRED LEASE—INCORPORATION OF TERMS OF LEASE — ARBITRATION CLAUSE — ACTION FOR OCCUPATION RENT — STAYING PROCEEDINGS — ARBITRATION ACT, 1889 (52-53 VICT. C. 49), SS. 4, 27—(R.S.O. C. 62, S. 6).

Morgan v. *Harrison* (1907) 2 Ch. 137 was an action for use and occupation. The defendants had been tenants of the plaintiffs of a colliery under a written lease which had expired. The lease contained a clause providing that disputes should be referred to arbitration. On the expiration of the lease the defendants asked for an extension of the lease and the plaintiffs wrote in reply that they might consider themselves tenants at will of the demised premises pending further arrangements. The defendants contended that the result of this was to incorporate into the tenancy at will by implication, so far as applicable, all the provisions of the written lease, including the arbitration clause, and they applied to stay the proceedings under the Arbitration Act (see R.S.O. c. 63, s. 6). Neville, J., refused the

motion, but the Court of Appeal (Cozens-Hardy, M.R., Barnes, P.P.D., and Buckley, L.J.) reversed his decision. Cozens-Hardy, M.R., lays it down that where an express tenancy at will is created after the termination of a written lease, the terms of such written lease, so far as applicable, apply to such tenancy at will. The other members of the Court however based their conclusion on the letters which had passed between the parties.

PRACTICE—APPEAL—INTERLOCUTORY OR FINAL ORDER.

In re Jerome (1907) 2 Ch. 145, the Court of Appeal (Cozens-Hardy, M.R., Barnes, P.P.D., and Kennedy, L.J.) held that an order dismissing an application to review a taxation of a solicitor's bill between solicitor and client, is, for the purpose of appeal, an interlocutory and not a final order, and one from which an appeal can not be had without leave. The Court refused to lay down any general rule on the subject, and the reasoning of at least one of the judges turns upon the inconvenience, from the multiplicity of appeals, which might result if such an order were held to be final. Apart from decisions, one would rather incline to the view that any order which finally determines any matter of substance in the course of litigation should be regarded as a final order.

PRACTICE—COSTS—ADMINISTRATION OF REALTY — INCIDENCE OF COSTS—DIRECTION IN WILL TO PAY TESTAMENTARY EXPENSES OUT OF PERSONAL ESTATE.

In re Betts, Doughty v. *Walker* (1907) 2 Ch. 149 deals with a point of practice which we do not remember having ever seen applied in Ontario. The action was for the administration of a deceased person's estate who had died intestate as to her real estate, and by her will had directed her testamentary expenses to be paid out of her personal estate. In the course of the administration it became necessary to institute inquiries as to who was the testatrix's heir at law; and the question then arose whether the costs of such inquiry should be borne by the personalty, a question which is of course very material where the beneficiaries of the realty and personalty are not the same persons. Kekewich, J., held that though the effect of the English Land Transfer Act, 1897 (see Ont. Devolution of Estates Act, R.S.O. 127, s. 4), is to make the costs of administering real estate "testamentary expenses," yet that the ordinary practice

of the Chancery Division, that the cost of administration so far as they have been increased by the administration of realty are to be borne by the realty, is still applicable; and accordingly that the costs of the inquiry as to the heirs at law must be borne by the realty, notwithstanding the direction contained in the will as to the payment of the testamentary expenses out of the personalty.

FRAUDULENT CONVEYANCE — POST NUPTIAL SETTLEMENT — INTENT TO HINDER, DELAY OR DEFRAUD CREDITORS — 13 ELIZ. C. 5—(R.S.O. C. 354, S. 1)—CHARGING ORDER—JUDGMENTS ACT, 1838 (1 & 2 VICT. C. 110), S. 14—(R.S.O. C. 324, S. 21) — RECEIVER — EQUITABLE EXECUTION — TRUSTEE — COSTS.

Ideal Bedding Co. v. *Holland* (1907) 2 Ch. 157. This was an action to set aside a post nuptial settlement of an equitable reversionary interest in personal estate made by a debtor as being a fraud on his creditors under 13 Eliz. c. 5, (R.S.O. c. 334, s. 1). The settlement was held by Kekewich, J., to be void under the statute because it prevented the creditor from obtaining a charging order under the Judgments Act, 1838 (1 & 2 Vict. c. 110, s. 14,—(R.S.O. c. 324, s. 21); or from obtaining the appointment of a receiver of the fund by way of equitable execution. The trustee of the settlement who had with knowledge of the settlor's destitution prepared the settlement in good faith, and appeared at the trial to defend it, was held entitled to his costs out of the settled property. It appearing that there might be a surplus after payment of creditors, it was held that the settlement ought not to be ordered to be delivered up to be cancelled, but that the trustee should be ordered to concur in all acts necessary to make the property included in the settlement available to satisfy the creditors' claims.

TRADE NAME—COMPANY—SIMILARITY OF NAME—RIGHT OF INDIVIDUAL TO USE HIS OWN NAME—TRANSFER TO COMPANY.

Fine Cotton Spinners v. *Harwood* (1907) 2 Ch. 184 was an action to restrain a defendant company from using the name of Cash as part of its trade name. The defendant company had been organized by a person named Harwood Cash, and the company was called "Harwood Cash Co." Harwood Cash was the son of a man named Cash who had carried on a busi-

ness under the name of "John Cash & Sons," which business has been bought, and was now owned by the plaintiffs. Harwood Cash had been an employee of John Cash & Sons, and on leaving that firm had promoted and registered the defendant company to carry on the same kind of business as that of John Cash & Sons. Joyce, J., held that although he had the right to carry on business in his own name, yet that the defendant company had no right to take a name which might have the effect of deceiving or misleading the public into the belief that there was some connection between the defendants' and the plaintiffs' business, and that it was quite immaterial that John Harwood Cash was a promoter or member of the defendant company.

VENDOR AND PURCHASER—TITLE—DEFECT IN TITLE—AGREEMENT BY VENDOR NOT TO INTERFERE WITH LIGHT TO ADJOINING PREMISES—DRAIN.

Pemsel v. *Tucker* (1907) 2 Ch. 191 was an application in the nature of an appeal from the certificate of a master on a reference as to title. The premises in question were sold under an open contract, and on a reference as to title the vendor produced an agreement made with an adjoining proprietor by which, in effect, the vendor had agreed not to interfere with the lights of the adjoining premises, and it also appeared that beneath the premises a drain ran which served two adjoining houses. Warrington, J., held that both these facts constituted objections to the title: the agreement operating as a restriction on the enjoyment of the premises sold, and the common drain being by statute vested in a municipal authority, so as to prevent the vendor from conveying all that he had contracted to sell.

STAYING ACTION—CAUSE OF ACTION ARISING OUT OF THE JURISDICTION—DEFENDANT TEMPORARILY WITHIN JURISDICTION—ABUSE OF PROCESS OF COURT.

In *Egbert* v. *Short* (1907) 2 Ch. 205 the defendant applied to stay, or dismiss, the action as being an abuse of the process of the Court. The defendant was a solicitor practising in Madras, and was trustee of a deed of separation made between the plaintiff and her husband who was an American domiciled in India. The action was brought for negligence on the part

of the defendant in not collecting the moneys payable under the deed. In October, 1906, the defendant was in England temporarily on a holiday, and, on the eve of his return to India, was served with the writ. The plaintiff was then in England but had since gone to America. In these circumstances as the liability of the defendant would have to be determined according to the law of India, and upon the evidence of witnesses in India, Warrington, J., was of the opinion that the action was not brought bona fide in England, and the injustice in bringing the action in England was so great, that the action ought not to be allowed to proceed, and he accordingly dismissed it with costs.

SOLICITOR—BILL OF COSTS—AGREEMENT AS TO COSTS—SIGNATURE—ATTORNEYS AND SOLICITORS ACT 1870 (33-34 VICT. C. 28), S. 4 (R. S. O. C. 174, S. 54).

Bake v. *French* (1907) 2 Ch. 215. The plaintiff, a solicitor, claimed in an account which was being taken before the Master a sum of £635 for costs under an agreement. The agreement in question was signed by the clients and enclosed in a letter to the plaintiffs. The agreement was dated 30th May, 1904, and was not signed by the plaintiffs. It waived the delivery of a detailed bill and agreed to the payment of £635 as costs with interest from 25th March, 1904. The agreement in blank had, however, been enclosed by the plaintiff in a letter to the defendant for signature. Warrington, J., thought that the agreement was so connected with the correspondence that it must be taken to have been signed by both parties, but even if it were in fact only signed by the defendant that was sufficient under the statute 33-34 Vict. c. 28, s. 4 (R.S.O. c. 174, s. 54), notwithstanding some conflicting decisions on that point. He, however, sent the agreement to the taxing officer for examination as to its reasonableness.

DEED—MISREPRESENTATION AS TO CHARACTER OF DEED—NON EST FACTUM.

Bagot v. *Chapman* (1907) 2 Ch. 222 was an action against a husband and wife on a mortgage, for foreclosure and judgment on the covenants for payment of the mortgage debt. The wife pleaded a plea of non est factum. The facts proved were to

the effect that the mortgage in question was made of a reversionary interest of the wife in a fund of £20,000. The mortgage was brought to her by her husband for execution, and he represented it to be a power to enable him at some future time to raise money on her reversionary interest, but he said he was not going to use it, and she should not suffer, and she was not told, nor did she know, that she was then parting with her interest, or incurring any personal liability by covenant or otherwise. The mortgage money, £12,000, was paid to her husband, and she never received any part of it. Eady, J., held that the deed was void as a conveyance of the reversionary interest, and was also void as a covenant by the wife for payment of the motrgage debt. The action was accordingly dismissed as against the wife.

LANDLORD AND TENANT—LICENCE TO ASSIGN LEASE—UNREASONABLY WITHHOLDING CONSENT—FINE—DECLARATORY JUDGMENT—COSTS.

In *Jenkins* v. *Price* (1907) 2 Ch. 229 the plaintiff, a lessee, claimed a declaratory judgment to the effect that he was entitled to assign his lease without the consent of the lessor, on the ground that the lessor's consent had been unreasonably withheld. The demised premises consisted of a public house, and the lease contained the usual covenant by the lessee not to assign without the consent of the lessor, but such consent was not to be unreasonably withheld. By the effect of a statutory provision in that behalf, no "fine" could be exacted by the lessor as a condition of giving his consent. The lessee proposed to assign the lease to a brewery company, whereby the house would become "a tied house," and the effect of this, as the landlord proved, would be to depreciate the value of the property by about £500, and in order to recoup this loss, therefore, he gave an unconditional consent to an assignment of the lease to any private person, but stipulated that if the assignment were made to a brewery the rent must be increased by £25 a year, and the time extended from twelve to twenty-one years. Eady, J., held that the terms imposed as a condition of consent to an assignment to a brewery was in the nature of a fine which the lessor was precluded from demanding, and, therefore, that his consent had been unreasonably withheld, and that the lessee might assign without his consent, but he held that that gave

the lessee no cause of action against the lessor for withholding his consent, and, therefore, the lessor could not be ordered to pay the costs of the action.

EXECUTOR — DEVASTAVIT — CLAIM ON GUARANTY — STATUTE OF LIMITATIONS—TRUSTEE ACT 1888 (51-52 VICT. C. 59), S. 8, SUB-S. 1.—(R.S.O. C. 129, S. 32(1).)

Lacons v. *Warmoll* (1907) 2 K.B. 350 was an action against one of two executors upon a guaranty given by their testator. The action was commenced in 1905 in respect of claims accruing due in 1903 and 1904. The plaintiff alleged that the defendant had been guilty of a devastavit in wrongfully handing over assets to a beneficiary under the will in 1898, without making provision for the liability under the guaranty now sued on. The County Court judge who tried the action held that the defendant was liable for the devastavit and gave a judgment against him de bonis testatoris et si non de bonis propriis for the amount of the plaintiff's claim, which judgment was affirmed by the Divisional Court (Kennedy and Lawrence, J.J.); but the Court of Appeal (Lord Alverstone, C.J., and Moulton and Buckley, L.JJ.) reversed the decision. The case was carried on without pleadings. The plaintiff's original plaint was to recover the amount payable under the guaranty, but he gave notice that he would claim that defendant had committed a devastavit; and the defendant gave notice that he would plead the Statute of Limitations as a bar to the alleged claim for devastavit. In the Courts below it was considered that as the claim on the guaranty did not become payable until 1903, the Statute of Limitations afforded the defendant no defence, because prior to that date the plaintiff could not have brought any action in respect of the devastavit. But the Court of Appeal hold that where an executor is sued in respect of a devastavit he is sued in respect of an alleged personal wrong and that, altogether apart from the Trustee Act, 1888, (see R.S.O. c. 129, s. 32), he is entitled to set up the Statute of Limitations as a bar, and that the statute begins to run, not from the date of the accrual of the plaintiff's right to sue the testator's representatives, but from the date the devastavit on which the plaintiff relies was actually committed. The judgment in so far as it was de bonis propriis was therefore held to be erroneous.

The judgment of Buckley, L.J., deserves careful attention

where he points out that while an executor sued for a devastavit may set up the Statute of Limitations as a bar, yet in an administration action it is not competent for a personal representative to discharge himself by setting up a devastavit more than six years prior to the action.

SOLICITOR AND CLIENT—AGREEMENT AS TO COSTS—ATTORNEYS' AND SOLICITORS' ACT, 1870 (33-34 VICT. C. 28), S. 4—(R.S.O. C. 174, S. 54).

In *Clare* v. *Joseph* (1907) 2 K.B. 369 the Court of Appeal (Lord Alverstone, C.J., and Moulton and Buckley, L.JJ.) have reversed a judgment of a Divisional Court (Darling and Ridley, JJ.). The action was by a client against solicitor to recover a sum of money had and received by the defendant while acting as the plaintiff's solicitor. The plaintiff alleged that by an oral agreement between himself and the defendant, the latter agreed to carry on an action against a third party on the terms that if successful he was to make no charge against the plaintiff for costs, but in case it was unsuccessful he was to be entitled to receive from the plaintiff the same amount of costs he would have recovered from the defendant if the action had been successful. The action had proved successful, but the defendant had retained a sum of money as costs out of the money recovered in the action. The jury found the agreement as a fact. The defendant contended it was invalid because not in writing, under the Solicitors Act, 1870, 33-34 Vict. c. 28, s. 4, (see R.S.O. c. 174, s. 54), and the Divisional Court gave effect to that contention, but the Court of Appeal held that the Act in question though providing that agreements under it shall be in writing, did not override the law as it previously existed enabling agreements as to costs to be made orally. See *Re Solicitor* 14 O.L.R. 464.

JUSTICES—JURISDICTION—BREACH OF PEACE—NO FORMAL CHARGE—POWER TO BIND OVER BOTH COMPLAINANT AND DEFENDANT TO KEEP THE PEACE—NO AVERMENT AS TO THREATENED BODILY HARM.

The King v. *Wilkins* (1907) 2 K.B. 380 was an application by a complainant to quash an order of justices of the peace,

binding the complainant to keep the peace towards the defendant, whom he had summoned for an alleged threatened breach of the peace. On the hearing of the complaint the defendant testified that the complainant had used threatening language toward him, and the justices found as a fact that there was a real danger of a breach of the peace on the part of both parties, and accordingly bound them both over to be of good behaviour. No formal complaint was made by the defendant against the complainant who appealed. The Divisional Court (Lord Alverstone, C.J., and Darling and Phillimore, JJ.) held that there was jurisdiction in the circumstances to make the order.

FATAL ACCIDENT—WIDOW—POSTHUMOUS CHILD—DEPENDENT ON DECEASED.

Williams v. *Ocean Coal Co.* (1907) 2 K.B. 422 although a case under the English Workmen's Compensation Act, 1897, may nevertheless be found useful in the construction of our Fatal Accidents Act, R.S.O. c. 166. In this case the deceased had been killed in course of his work in circumstances entitling those dependent on him to compensation, and the question was whether his widow and posthumous child were in fact dependent on him. The facts being, that the deceased had been married in 1903 and for about nine months after lived with his wife's parents. He then lived with his wife in apartments for about six weeks. The wife then returned to her parents and the deceased went off to seek work. The wife had not seen him since Decmber, 1905, and in April, 1906, he was killed. A posthumous child of which deceased was the father was born in April, 1906. The County Court judge had held that the widow and child were not actually dependent on the deceased and were, therefore, not entitled to compensation, but the Court of Appeal (Cozens-Hardy, M.R. and Barnes P.P.D. and Kennedy, L.J.) held that he had overlooked the legal presumption of dependency in the case of the wife, and that on that presumption there was a total dependency of the wife. Also that under the recent case of *Villar* v. *Gilbey* (1907) A.C. 139, the posthumous child was also a dependent, and entitled to compensation.

Correspondence.

BARGAINS BETWEEN SOLICITORS AND CLIENTS AS TO COSTS.

To the Editor of the Law Journal:

Dear Sir,—In a recent number of the *Law Journal* (p. 554). you make brief reference to *Re Solicitor,* reported on p. 575. Permit me to offer a few observations.

The facts in this case were briefly as follows: A sailor named Ellis, sailing on a sailing vessel coming into Port Hope one night in rough weather, jumped on to the dock to make fast a cable, and in the dark ran into some barbed wire and lost an eye. Like most sailors, he was a poor man, and what little he had saved went to pay doctor's bills. He sought help from the Standard Ideal Co., by whom the wire had been placed on the dock; but no attention was paid to him. Then he consulted a solicitor living in Picton near his home. The solicitor went to the trouble of making enquiries which confirmed Ellis' story, and concluded that Ellis had good cause of action against the company. The solicitor wrote to the latter on Ellis' behalf, asking for reasonable compensation for his expenses and loss of eye; but no attention was paid to the letter. Thereupon the bargain reviewed by the learned Chancellor was entered into and an action for damages launched. I venture to think that the language used by him, if correctly reported in 10 O.W.R. 226, is unnecessarily harsh, so far as this particular case is concerned.

One feature of the case should not be overlooked. Every solicitor knows that in undertaking an action for a man of no means like Ellis he runs the risk of a settlement by his client behind his back. Indeed, a client of the Ellis class, too frequently, in fact usually, thinks it exceedingly clever to "beat" his lawyer. He is worthless; he pockets what the solicitor obtains for him by the stress of a writ, and laughs at him. If the solicitor attempts to get his costs out of the defendant, he has formidable difficulties to encounter; and usually may be thankful if he is not mulcted in costs: See *De Santis* v. *C. P. Ry. Co.*, not reported. Meantime, he has had to pay out considerable in disbursements, such as for examination for discovery without which he could hardly with safety go down to trial. In this case the company offered $1,000 and costs just before the trial came on. This sum Ellis was quite willing to accept, but the solicitor refused to take it as insufficient. The trial went on, and the jury brought in a verdict for $2,600 which was confirmed by a Divis-

ional Court. Ellis was quite willing to accept $1,000, but through the exertions of his solicitor he actually got nearly double that sum after deducting the amount in dispute; yet he proceeded to rend his solicitor.

The Chancellor, however, suggests that the solicitor "might well have undertaken the case as a matter of professional benefaction!" A kind suggestion truly. He "might have done" so, but should he? He has to live by his profession, and his client has nothing to complain of.

The report does not set forth "the true method of dealing with impoverished clients laid down by Lord Russell of Killowen." He seems to have forgotten that the Osgoode Hall library is not readily available to most country practitioners.

The learned Chancellor invokes the ancient law regarding champerty, and he may have been justified in so doing, although some in the profession think that the recent legislation as to costs has abrogated it, at least to a considerable extent. But a law suit, especially for a pauper client, involves no slight risk. The Court of Appeal recently overruled the trial Judge and a Divisional Court, and unanimously held that a father instead of recovering from the C. P. Ry. Co. for the death of his son was really under a deep obligation to defendants for releasing him from a bargain the Court considered to be improvident by killing the son. See *Moir* v. *C.P. Ry. Co.*, not reported.

A solicitor should either not listen to an "impoverished" client at all, or take the case "as a matter of professional benefaction," run all risks of success or failure, time, labor and money spent, of a settlement behind his back, and of being cast aside and some other solicitor employed in his stead by a client who has nothing to lose. If he wins out, he should then go to his client and say: "I'm in your power; what are you going to do with me?" Otherwise, he is in for a scathing from a judge and probably an investigation by the Law Society by his Lordship's direction.

Let it be noted, too, that the cost of living has of late greatly increased; even judicial salaries have, very properly too, been raised; but for solicitors there is the same old tariff of half a century ago, and they are under the invocation of the ancient champerty statutes passed upwards of 600 years ago. Moreover, it is a common remark amongst the profession that when a solicitor becomes a judge he seems to lose all remembrance of the difficulties under which his late brethren labor; and if he has to order costs, he faithfully reduces them to the lowest notch.

A SOLICITOR.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

B.C.] MORTON *v.* FULTON. [June 24.

Constitutional law—Construction of statute—Duty of responsible Ministers of the Crown—Refusal to submit petition of right—Right of action—Damages — Pleading—Practice—Withdrawal of case from jury—New trial—Costs.

Under the provisions of the "Crown Procedure Act," R.S. B.C. ch. 57, an imperative duty is imposed upon the Provincial Secretary to submit petitions of right for the consideration of the Lieutenant-Governor within a reasonable time after presentation, and failure to do so gives a right of action to recover damages.

After a decisive refusal to submit the petition has been made, the right of action vests at once, and the fact that a submission was duly made after the institution of the action is not an answer to the plaintiff's claim.

In a case where it would be open to a jury to find that an actionable wrong had been suffered and to award damages, the withdrawal of the case from the jury is improper and a new trial should be had.

The Supreme Court of Canada reversed the judgment appealed from, which had affirmed the judgment at the trial dismissing the action with a variation allowing the plaintiff his costs up to the time of service of the statement of defence, costs being given against the defendant in all the courts and a new trial ordered. DAVIES and MACLENNAN, JJ., dissented, and taking the view that the refusal, though illegal, had not been made maliciously or wrongfully, considered that on that issue the plaintiff was entitled to nominal damages, that, in other respects, the judgment appealed from should be affirmed and that there should be no costs allowed on the appeal to the Supreme Court of Canada.

Deacon, for appellant. *Nesbitt*, K.C., for respondent.

Ont.] SCOTT *v.* SWANSON. [June 24.

Assignments and Preferences Act, s. 11—*Assignment by mortgagor — Foreclosure — Payment by assignee of judgment —Redemption.*

After judgment for foreclosure of mortgage or redemption judgment creditors of the mortgagor with executions in the sheriff's hands were added as parties in the master's office and proved their claims. The master reported that they were the only incumbrances and fixed a date for payment by them of the amount due the mortgagees. After confirmation of this report S. obtained assignments of the judgments and was added as a party. He then paid the amount due the mortgagees and the master took a new account and appointed a day for payment by the mortgagor of the amount due S. on the judgments as well as the mortgage. This report was confirmed, and the mortgagor having made an assignment for the benefit of creditors before the day fixed for redemption an order was made by a judge in Chambers adding the assignee as a party, extending the time for redemption and referring the case back to the master to take a new account and appoint a new day.

Held, affirming the judgment of the Court of Appeal, 13 O.L.R. 127 (sub nom. *Federal Life Ass. Co.* v. *Stinson*), that under the provisions of s. 11 Assignments and Preferences Act, the assignee of the mortgagor could only redeem on payment of the total sum due to S. under the mortgage and the judgments assigned to him.

D. L. McCarthy, for appellant. *H. Cassels*, K.C., and *R. S. Cassels*, for respondent.

Ont.] [June 24.

CANADIAN PACIFIC RY. CO. *v.* GRAND TRUNK RY. CO.

Specific performance—Tender for land—Agreement for tender —One party to acquire and divide—Division by plan— Reservation of portion of land from grant.

By agreement through correspondence the G.T.R. Co. was to tender for a triangular piece of land containing 19 acres offered for sale by the Ontario Government and convey half to the C.P.R. Co. which would not tender. Division was to be

made according to a plan of the block with a line drawn through the centre from east to west, the C.P.R. Co. to have the northern half. The G.T.R. Co. acquired the land but the Government reserved from the grant two acres in the northern part. In an action by the C.P.R. Co. for specific performance of the agreement,

Held, affirming the judgment of the Court of Appeal (14 O.L.R. 41), MACLENNAN and DUFF, JJ., dissenting, that the C.P.R. Co. was entitled to one-half of the land actually acquired by the G.T.R. Co. and not merely to the balance of the northern half as marked on the plan. The Court of Appeal directed a reference to the Master in case the parties could not agree on the mode of division.

Held, that such reference was unnecessary and that the judgment appealed against should be varied in this respect.

W. Cassels, K.C., and *Cowan*, K.C., for defendants, appellants. *Armour*, K.C., and *MacMurchy*, for respondents.

Ont.] ROBINSON *v.* MCGILLIVRAY. [June 24.

Insolvency—Preferential transfer of cheque—Deposit in private bank—Application of funds to debt due banker—Sinister intention—Payment to creditor.

McG., a merchant in insolvent circumstances, although not aware of that fact, sold his stock-in-trade and deposited the cheque received for the price to the credit of his account with a private banker to whom he was indebted, at the time, upon a overdue promissory note that had been, without his knowledge, charged against his account a few days before the sale. Within two days after making the deposit McG. gave the banker his cheque to cover the amount of the note. In an action to have the transfer of the cheque, so deposited, set aside as preferential and void,

Held, affirming the judgment appealed from, 13 O.L.R. 232, that the transaction was a payment to a creditor within the meaning of R.S.O. (1897), c. 147, s. 3, sub-s. 1, which was not, under the circumstances, void as against creditors.

G. C. Gibbons, K.C., for appellants. *Meredith*, K.C., and *Brewster*, for respondents.

Ont.] SINCLAIR *v.* TOWN OF OWEN SOUND. [June 24.

Municipal Act—Vote on by-law—Local option—Division into wards—Single or multiple voting.

Sec. 355 of the Ontario Municipal Act, 3 Edw. VII. c. 19, providing that "when a municipality is divided into wards each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to enable him to vote on the by-law" does not apply to the vote on a local option by-law required by s. 141 of the Liquor License Act (R.S.O. 1897, c. 245).

Judgment of the Court of Appeal, 13 Ont. L.R. 447, affirming that of the Divisional Court, 12 Ont. L.R. 488, affirmed.

W. Nesbitt, K.C., and *Wright*, for plaintiff, appellant. *F. E. Hodgins*, K.C., and *Frost*, for respondents.

Ont.] KIRSTEIN *v.* COHEN BROS., LTD. [June 24.

Trade-mark—Infringement—Inventive term—Coined word—Exclusive use—Colourable imitation—Common idea—Description of goods—Deceit and fraud.

The hyphenated coined words "shur-on" and "staz-on" are not purely inventive terms but are merely corruptions of words descriptive of the goods (in this case, eye-glass frames) to which they were applied, intending them to be so described, and, therefore, they cannot properly be the subject of exclusive use as trade-marks. A trader using the term "staz-on" as descriptive of such goods, is not guilty of infringement of any rights in the use of the term "shur-on" by another trader as his trade-mark, nor of fraudulently counterfeiting similar goods described by the latter term; nor is such a use of the former term a colourable imitation of the latter term calculated to deceive purchasers, as the terms are neither phonetically or visually alike. The judgment appealed from, 13 Ont. L.R. 144, affirmed.

Cassels, K.C., and *McIntosh*, for appellants. *J. H. Moss*, and *C. A. Moss*, for respondents.

N.B.] FLEMING *v.* MCLEOD. [June 24.

Promissory note—Protest in England—Notice of dishonour to indorser in Canada — Address — First mail leaving for Canada—Notice through agent—Agreement for time—Discharge of surety—Appropriation of payments—Evidence.

Notes made in St. John, N.B., were protested in London, England, where they were payable. The indorser lived at Richibucto, N.B. Notice of dishonour of the first note was mailed to the indorser at Richibucto, and, at the same time, the protest was sent by the holders to an agent at Halifax, N.S., instructing him to take the necessary steps to obtain payment. The agent, on the same day that he received the protest and instructions, sent, by post, notice of the dishonour to the indorser at Richibucto. As the other notes fell due, the holders sent them and the protests, by the first packet from London to Canada, to the same agent at Halifax, by whom the notices of dishonour were forwarded to the indorser at Richibucto.

Held, IDINGTON and DUFF, JJ., dissenting, that the sending of the notices of dishonour of the first note direct from London to Richibucto, with the precaution of also sending it through the agent was an indication that the holders were not aware of the correct address of the indorser and the fact that they used the proper address was not conclusive of their knowledge or sufficient to compel an inference imputing such knowledge to them. Therefore, the notices in respect to the other notes sent through the agent were sufficient.

Per IDINGTON and DUFF, JJ., dissenting, that the holders had failed to shew that they had adopted the most expeditious mode of having the notices of dishonour given to the indorser.

The maker of the note gave evidence of an offer to the holders to settle his indebtedness, on certain terms and at a time some two or three years later than the maturity of the last note, and that the same was agreed to by the holders. The latter, in their evidence, denied such agreement and testified that, in all the negotiations, they had informed the maker that they would do nothing whatever in any way to release the indorser.

Held, that the evidence did not shew that there was any agreement by the holders to give time to the maker and the indorser was not discharged. If the existence of an agreement could be gathered from the evidence it was without consideration, and the creditor's rights against the sureties were reserved.

Per IDINGTON and DUFF, JJ., that a demand note given in renewal of a time note and accepted by the holders is not a giving of time to the maker by which the indorser is discharged.

Judgment of the Supreme Court of New Brunswick, 37 N.B. Rep. 630, reversed.

Teed, K.C., for plaintiff, appellants. *W. D. Carter*, for respondent.

Man.] CARRUTHERS *v.* CANADIAN PACIFIC RY. CO. [June 24.

Negligence—Railway — Animals at large — Meaning of "At large upon the highway or otherwise"—Fencing—Trespass from lands not belonging to owner.

C.'s horses strayed from his enclosed pasture situated beside a highway which ran parallel to the company's railway, entered a neighbour's field adjacent thereto, passed thence upon the track through an opening in the fence which had not been provided with a gate by the company, and were killed by a train. There was no person in charge of the animals, nor was there evidence that they got at large through any negligence or wilful act attributable to C.

Held, affirming the judgment appealed from, 16 Man. R. 323, that under the provisions of the Railway Act, 1903, s. 237, sub-s. 4, the company was liable to damages for the loss sustained notwithstanding that the animals had got upon the track while at large in a place other than a highway intersected by the railway.

Blackstock, K.C., for defendants, appellants. *J. E. O'Connor*, for respondent.

Man.] DAY *v.* CROWN GRAIN COMPANY. [June 24.

Mechanics' lien — Completion of contract — Time for filing claim—Right of appeal.

The time limited for the registration of claims for liens by sec. 20 of "The Mechanics' and Wage Earners' Lien Act," R.S.M. 1902, c. 110, does not commence to run until there has been such performance of the contract as would entitle the con-

tractor to maintain an action for the whole amount due thereunder.

The judgment appealed from, 16 Man. R. 366, was reversed. DAVIES and MACLENNAN, JJ., dissented on the ground that the evidence was too unsatisfactory to justify an extension of the time. The court refused to quash the appeal on the ground that the right of appeal had been taken away by s. 36 of the statute above referred to.

C. P. Wilson, and *A. E. Hoskin*, for plaintiff, appellant. *Alex. C. Galt*, for respondents.

Man.] MCNICHOL v. MALCOLM. [June 24.

Landlord and tenant—Negligence—Master and servant—Acts in course of employment—Alterations—Damage by steam —Responsibility of contractors—Control of premises — Cross-appeal between respondents—Practice.

In the lease of a shop the landlord agreed to supply steam heating, and, in order to improve the system, engaged a firm of plumbers to make alterations. Before this work was completed and during the absence of the tenant, the plumbers' men who were at work in another part of the same building, with steam cut off for that purpose, at the request of the caretaker employed by the landlord, turned the steam on again, which, passing through unfinished pipes connected with the shop escaped through an open valve in a radiator and injured the tenant's goods.

Held, that the landlord was liable in damages for the negligent act of his caretaker in allowing steam to be turned on without ascertaining that the radiator was in proper condition to receive the pressure, and that the plumbing firm was also responsible for the negligence of their employees in turning on the steam, under such circumstances, as they were acting in the course of their employment in what they did although requested to do so by the caretaker. The judgment appealed from, 16 Man. R. 411, was affirmed with a variation declaring the plumbers jointly liable with the landlord. The action was against the two defendants jointly, and the plaintiffs obtained a verdict at the trial against both. The Court of Appeal confirmed the verdict as to McN., and dismissed the action as to

the other defendants. McN. appealed to the Supreme Court of Canada, making the other defendants respondents on his appeal.

Held, that the plaintiff, respondent, was entitled to cross-appeal against the said defendants, respondents, to have the verdict against them at the trial restored.

Appeal dismissed with costs, and cross-appeal allowed with costs.

W. Nesbitt, K.C., *Atkins*, K.C., and *Coyne*, for plaintiff, appellant. *Chrysler*, K.C., and *Ormond* and *C. P. Wilson*, for respondents.

Man.] FAIRCHILD COMPANY *v.* RUSTIN. [June 24.

Contract—Sale of machinery—Agreement for lien—Delivery.

The company sold R. an entire outfit of second-hand threshing machinery for $1,400, taking from him three so-called promissory notes for the entire price. Two days before giving the notes R. had signed an agreement setting out the bargain, in which the following provisions appeared:—"And for the purpose of further securing payment of the price of the said machinery and interest . . . the purchaser agrees to deliver to the vendor, at the time of the delivery of the said machinery as herein provided, or upon demand, a mortgage on the said lands (i.e., lands described at the foot of the agreement) in the statutory form containing also the special covenants and provisions in the mortgage usually taken by the vendors. And the purchaser hereby further agrees with the said vendors that the vendors shall have a charge and a specific lien for the amount of the purchase money and interest, or the said amount of the purchase price, less the amount realized, etc., should the vendors take and resell the said machinery . . . and any other land the purchaser now owns or shall hereafter own or be interested in, until the said purchase money and all costs, charges, damages and expenses, and any and all notes or renewals thereof shall have been fully paid, and the said lands are hereby charged with the payment of the said purchase money, obligations, notes and all renewals thereof, and interest, and all costs, charges, damages and expenses as herein provided, and, for the purpose of securing the same, the purchaser hereby grants to the vendors the said lands. . . . And, on default, all

moneys hereby secured shall at once become due and all powers and other remedies hereby given shall be enforceable." In an action to recover the amount of the notes past due and to have a decree for a lien and charge upon the lands therefor under the agreement,

Held, reversing the judgment appealed from, that the right of the company to enforce the lien depended upon the interpretation of the whole contract; that the provision as to the lien only become operative in the case of a complete delivery pursuant to the contract, and that the alternative words "or upon demand" must be taken as meaning upon a demand made after such complete delivery.

W. R. Mulock, K.C., for defendant, appellant. *C. P. Wilson,* and *A. E. Hoskin,* for respondents.

Province of Nova Scotia.

SUPREME COURT.

Russell, J.] GOSCOMBE *v.* LAIRD. [Aug. 21

Indigent debtor—Arrest — Wilful and malicious tort — Liquidated amount—Appeal from commissioners.

The Indigent Debtors Act, R.S. 1900, c. 183, s. 15, empowers the Court or judge, where it appears upon the examination of the debtor . . . "(f) in cases of tort that such tort was wilful and malicious" to "remand the debtor to be confined without the privileges of jail limits for such term not exceeding one year as is deemed proper under the circumstances."

Defendant was in prison under an order for arrest (capias) in an action claiming damages for crim. con., and on application to commissioners under the Indigent Debtors Act an order was made for his discharge.

Plaintiff appealed on the ground that the tort of which defendant had been guilty was wilful and malicious.

Held, dismissing the appeal, that the order for arrest simply establishes a sum which, in the opinion of the judge who allows

it, would be sufficient security for the plaintiff, but it was not to be intended that the defendant should be imprisoned under the section except in consequence of circumstances connected with a claim for an ascertained and liquidated amount, which he could pay at any time after his imprisonment and thereby secure his discharge.

J. R. Johnstone, for appellant. *W. J. O'Hearn*, for respondent.

Russell, J.] THE KING *v.* REID. [Sept. 2.

Criminal law—Summary trial before magistrate—Jurisdiction—Irregularity in trying second case before deciding first.

Defendant was tried before the stipendiary magistrate at Halifax on two charges, one for assault and the other for pointing firearms at the complainant. Both cases were tried before any decision was given in either of them. The magistrate then proceeded to convict defendant for the assault and acquitted him on the other charge.

It was conceded that the case should be dealt with as if an affidavit had been made by the magistrate to the effect that he had not been influenced in deciding the first case by any evidence taken in the second.

It was also conceded that all the evidence applicable to both cases had been taken on the trial of the first charge and that nothing was added on the second trial that could influence the magistrate in deciding the case first tried.

On motion for a habeas corpus, the offence being clearly proved and no evidence being offered in exculpation,

Held, that the irregularity in trying both cases together was not ground for holding the conviction void. The magistrate asked the prisoner whether he consented that the charge should be tried by him or should be sent for trial by jury at the next sittings of the Supreme Court of Criminal Jurisdiction at Halifax, there being nothing in the statute requiring the date of the sittings to be named.

Held, that the objection that the requisite question was not put to defendant in order to give the magistrate power to deal summarily with the case must fail.

O'Hearn, in support of application. *Knight*, contra.

Full Court.] GOULD *v.* GILLIES. [Sept. 2.

Company—Promissory note given in payment for shares—False representation by agent—Liability of principal—Damages.

Defendant was induced to sign an application for shares in a company on the representation that the shares subscribed for were treasury stock, and that the money paid was to go into the treasury and was to be used for certain specified purposes. The shares were, as a matter of fact, the property of plaintiff, and the promissory note given by defendant in payment was indorsed to plaintiff. In an action on the note,

Held, 1. It was not necessary for defendant to shew that the false statement was the sole inducement which led him to apply for the shares or to explain upon which particular false statement he relied.

2. Defendant had not lost the right to assert his claim for damages through delay in repudiating the contract.

3. It was not open to plaintiff to say that he did not authorize anyone to sell his shares as "treasury stock" when, as a matter of fact they were sold as such, and that he was liable for the fraudulent acts of his agent even if he was innocent himself.

W. B. A. Ritchie, K.C., and *Robertson*, for appellant. *Mellish*, K.C., *O'Mullin* and *O'Connor*, for respondent.

Full Court.] THE KING *v.* BARNES. [Sept. 2.

Crown case reserved—Question of fact.

The prisoner was tried and convicted before GRAHAM, E.J., with a jury for rape committed upon the person of a girl of the age of 14 years.

On a case reserved by the trial judge there were contradictory affidavits as to a communication alleged to have been made by the sheriff to the jury while they were considering their verdict, two of the jurymen swearing in answer to a question put by them to the sheriff that the latter said they would be obliged to report the prisoner guilty of rape, but if they did so and recommended the prisoner to mercy the judge would give him a light sentence. The sheriff in his affidavit denied this and said: "Whatever your verdict, bring it into Court."

Held, that the Court had no jurisdiction to decide a question of fact on a case reserved.

Per GRAHAM, E.J., and RUSSELL, J., that the conviction should be quashed.

Roscoe, K.C., for the prisoner. *Cluney*, for the Crown.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] THEO NOEL CO. *v.* VITÆ OZÆ CO. [Aug. 15.

Discovery—Injunction against use of trade name—Questions tending to shew misrepresentation by plaintiffs as to their goods.

Motion to compel the plaintiffs' manager to answer certain questions which he had refused to answer when cross-examined on his affidavit filed in support of the plaintiff's motion for an injunction to restrain the defendants from advertising, etc., any medicinal preparation under the name of Vitæ Ozæ or V. O. or any names resembling the same or calculated to mislead the public.

The questions were directed to the point whether, as contended by the defendants, the advertisements of the plaintiffs' preparation contained misrepresentations as to their curative value and ingredients.

Held, that the truth or falsity of the advertising matter put forth by the plaintiffs was relevant to the motion for an injunction and that the questions must be answered.

Minty, for plaintiffs. *O'Connor* and *Blackwood*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] NEVILLE *v.* KELLY. [June 7.

Master and servant—Injury arising out of and in the course of employment.

While engaged in chipping the burrs from a steel plate with

a cold chisel, the plaintiff was injured by a piece of the steel so chipped off, striking him in the eye and destroying its sight.

Held, on appeal, affirming the decision of MORRISON, J., that the injury was an accident within the meaning of the Workmen's Compensation Act, 1902.

W. S. Deacon, for the appellants (respondents in the court below). *McCrasson* and *Harper*, for respondent (appellant below).

Full Court.] MARKS *v.* MARKS. [July 18.

Will, construction of—Description of legatee—"To my wife"—Bigamous marriage, presumption of—Evidence taken on commission—Discretion of trial judge to dispense with reading in full, or to accept a statement of its effect.

In December, 1873, the plaintiff, Annie J. Marks, then aged 21, was returning from a visit to Detroit. Whilst waiting at the Windsor depot she made the acquaintance of the deceased, A. J. Marks, then a widower. After an acquaintance of an hour or so, she decided to go with him by train to Stratford, during which time the couple became engaged. She did not return to her home in Kincardine, but waited for a few weeks when she received and accepted a request from him to meet her at Brantford. They then went to Buffalo, where she contends they were married. After a short absence they returned to Kincardine, where they kept house as man and wife until the spring of 1876, when he sold the furniture, kept the proceeds and left her, but returned in the fall of 1877. During his absence he did not provide for her support. He lived with her until the spring of 1878, when he left for Winnipeg. They apparently parted on friendly terms; she did not request to be taken with him; they did not correspond with each other; she made no demand for support from him and he gave her none. In 1895 he returned to Kincardine, but did not visit her, although he visited her mother and sister, and made enquiries concerning her. He died in October, 1904, but commencing in January of that year he opened a correspondence with her. These letters were produced at the trial by her. In all of these communications he addressed her as "Dear Friend" and she replied in the same way. In 1888, she lived with a man named Frankboner in Michigan, assumed his name and went as his wife.

For the purposes of this action she had visited Buffalo, but was unable to discover any record of her marriage. She gave evidence to the effect that no public records of marriages in Buffalo were kept before 1878. She could not trace the witnesses, the hotel where she was married having been destroyed, and the minister being dead. She also gave evidence that deceased had taken possession of her marriage certificate in 1878, but his son swore that he had searched through all his father's papers in vain for the certificate, or any evidence that the plaintiff had ever been the wife of A. J. Marks.

In November, 1903, nearly two years after his marriage to the defendant Susan Elizabeth Marks, deceased wrote to plaintiff Annie, stating that he had obtained her address from her sister. He then addresses her as "Dear Friend," and this correspondence continued until August, 1904, she sending in one of her letters her photograph, with "A. Frankboner" written on the back. In a letter from the deceased to her he spoke of the time "you and I were one" at Tift House in Buffalo. This is the only reference to their former relations. At the trial plaintiff's sister and cousin swore to having seen the paper supposed to be the marriage certificate, but neither witness remembered the contents of the document.

Deceased married Susan in March, 1902, at Nelson, B.C., prior to his opening up correspondence with Annie and during this period he also, when absent, wrote to Susan, but always addressed her as "my dear wife" and signed himself "your loving husband." He made his will at Nelson on the 6th of May, 1904, leaving to "my wife" $50 per month during her lifetime payable out of his estate.

It is on this clause in the will that action was brought, it being contended that the marriage to Susan was a bigamous union and that the legacy ought, therefore, to go to Annie, who set up her alleged marriage in 1873.

Held, on appeal, affirming the decision of HUNTER, C.J. (MARTIN, J., dissenting), that there was nothing in the evidence to displace the presumption that the deceased had not committed bigamy in marrying Susan in 1902, and that she was the person designated in the will as "my wife" and "my said wife."

Whether all the evidence taken upon commission in an action shall be read at length, or read in part and stated in

part, or stated by counsel at the trial is a matter in the discretion of the trial judge.

Cassidy, K.C., for plaintiff, appellant. *S. S. Taylor*, K.C., for respondent. *Lindley Crease*, for trustees.

Full Court.] STEPHENSON *v.* STEPHENSON. [July 18.

Mining law—Hydraulic lease—Dispute note—Special defence—Free miner's certificate—Recorded interest—New defence on appeal.

A defence setting up failure to comply with the provisions of the Placer Mining Act must be specifically pleaded, *e.g.*, lack of a free miner's certificate and failure to record interest.

Unless exception be taken at the trial to the jurisdiction of the County Court, it will not be entertained on appeal.

Gelinas v. *Clark* (1901), 8 B.C. 42, 1 M.M.C. 428, followed.

Wilson, K.C. and *Bloomfield*, for defendants, appellants. *Martin*, K.C., for respondent.

Irving, J.] [July 19.

DUDGEON *v.* DUDGEON & PARSONS.

Husband and wife—Property purchased by wife with husband's money—Resulting trust—Sale by wife—Notice to purchaser.

A husband from time to time gave his wife money to pay for certain property which constituted their home. While they were living apart through a disagreement, the wife entered into negotiations with defendant Parsons for the sale of the property and received a payment on account of the purchase price. Plaintiff thereupon notified the purchaser of his claim, but the purchaser anticipated the due date of final payment and completed the purchase.

Held, that there was a resulting trust in favour of the husband, and that he was entitled to recover from the purchaser, but that as there was a dispute between the husband and wife as to a proportion of the money being her own when the property was purchased by them, the amount recovered from defendant Parsons be paid into Court pending a reference.

Helmcken, K.C., and *Peters*, K.C., for plaintiff. *A. E. McPhillips*, K.C., for defendant Dudgeon. *Wootton*, for defendant Parsons.

Clement, J.] [July 30.

BROHM *v.* B. C. MILLS, TIMBER AND TRADING CO.

Crown grant issued of lands covered by timber lease—Renewal of timber lease subsequent to issue of Crown grant.

Plaintiff obtained a Crown grant to certain lands, to the timber on which a lease for 21 years had been previously given. The grant from the Crown was silent as to the timber lease. At a date subsequent to the said grant, the timber lease had to be surrendered for renewal under the provisions of the Land Act.

Held, that the rights given the grantee under his Crown grant were subject to the existing timber lease; and that the lessees did not lose their priority by taking a renewal under the Act.

G. C. Duncan, for plaintiff. *C. B. Macneill*, K.C., for defendants.

Book Reviews.

Burge's Commentaries on Colonial and Foreign Laws generally and in conflict with each other and the law of England. New edition, under the editorship of A. W. RENTON, Judge of the Supreme Court of Ceylon, and G. G. PHILEMORE, B. C.L., Barrister-at-law. Vol. 1., London, Sweet & Maxwell, Limited, 3 Chancery Lane; Stevens & Sons, Limited, 119-120 Chancery Lane, 1907.

We are told that this work is to be completed in five volumes, and that among the assistant editors are, as to the law of Canada, Professor Walters of McGill College, Montreal; Professor A. H. Lefroy, and Professor McGregor Young, of Toronto University. There are eight other assistant editors in connection with the systems of law in other countries.

Mr. Burge, after some twenty years spent in Jamaica, part

of the time as Attorney-General, returned to England where he was concerned in most of the important cases coming before the Judicial Committee of the Privy Council in reference to constitutional questions. In 1838 he published his Commentaries on Colonial and Foreign Laws. His learning as well as his experience gained as an advocate in connection with appeals from various parts of the British Empire gave him great familiarity with the different systems of law expounded in his book. Since it appeared, changes of the most far-reaching character have passed over the British Empire and the world. This has made necessary a re-casting of his work, and the editors in the volume before us describe generally the character of the different systems that underlie the jurisprudence of the legal world, and their relations to the present laws of the British dominions, and trace the outlines of the existing juridical constitutions of these dominions, exclusive of the United Kingdom, and discuss the position of tribunals which have been established in lands not forming an integral part of His Majesty's dominions. Appended to this volume is a tabulated statement shewing the conditions regarding appeals to the Judicial Committee of the Privy Council from British Courts of justice outside the United Kingdom. This is an interesting table and gives a bird's eye view of the jurisdiction of the highest court of appeal for the outlying British possessions. It would have been convenient if there had been a table of contents, and some information a little more easily obtainable as to what its contents consist of.

This volume is introductory to the more detailed and expanded treatment of colonial and foreign laws and their conflicts with each other and with the law of England to be given in succeeding volumes. The aim of the editors is an ambitious one and the result of their labours in the volumes to follow will be looked for with great interest.

Bench and Bar.

MR. T. C. PATTESON.

Scarcely known to the profession of this day as having been one of their number, Mr. Thomas Charles Patteson, whose death

occurred on the 21st ult., was a well-known figure in legal circles a generation ago, as a member of the then firm of Ross, Lauder & Patteson. His inclination did not run in the direction of law as a continuous pursuit, and so, when the *Mail* newspaper was founded he became its editor, in which position he remained until appointed Post-Master of Toronto. As a journalist he wrote with great facility, bringing to the subject under discussion a keen intellect and large knowledge of men and affairs. His language and his writings were not only scholarly but trenchant. The duties which devolved upon him in the position which he occupied in later years were discharged with great satisfaction and with careful attention to and mastery of all details. A large circle of friends will mourn his loss.

MR. J. E. HALLIWELL.

The following resolution was passed at a meeting of the County of Hastings Law Association, held at Belleville on 16th ult., W. N. Ponton, President, in the chair.

Moved by Mr. John Parker Thomas, seconded by Mr. John J. B. Flint:

"That the members of the County of Hastings Law Association tender their sincere and heartfelt sympathy to Mrs. Halliwell and to her little ones in this hour of deep bereavement. And they further desire to record their own personal sense of loss through the decease of their late friend and brother barrister, Lieutenant-Colonel John Earl Halliwell, whose sad and sudden death has deprived the Bar of an earnest and able advocate, Canada of a loyal and public-spirited citizen, and friends of a genial and true-hearted comrade."

CANADA GAZETTE.

Nicholas Du Bois Dominic Beck, K.C., of Edmonton, to be a judge of the Supreme Court of Alberta. (Sept. 23, 1907.)

Hon. John Henderson Lamont, K.C., of Prince Albert, to be a judge of the Supreme Court of Saskatchewan. (Sept. 23, 1907.)

Hon. William Pugsley, K.C., to be Minister of Public Works, in the room of Hon. Charles Hyman, resigned. (Aug. 30, 1907.)

Canada Law Journal.

VOL. XLIII. NOVEMBER 1. NO. 21.

AGREEMENTS BETWEEN SOLICITORS AND CLIENTS AS TO COSTS.

In a recent case in which a solicitor was concerned the Chancellor of Ontario reprobated, in strong terms, an agreement made by the solicitor with his client to the effect that the latter would prosecute an action for personal injury to the client on the terms that the solicitor should receive, over and above his taxable costs, a sum equal to twenty-five per cent. of the amount recovered, and also a further sum of $200, for which the solicitor stipulated, as a condition of arguing an appeal from the judgment pronounced at the trial of the action. The first part of the agreement was held to savour of champerty and the second was characterized as a "stand and deliver outrage" which could not be tolerated.

The definition of champerty in the old statute of Edw. I., now embodied in R.S.O. vol. 3, c. 327, is as follows: "Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains," and the statute makes void all champertous agreements.

This definition seems to import that the champertor must move (i.e. promote) the suit. Does it apply to the case of a client who comes to a solicitor with his suit? Clearly not, otherwise it is hard to conceive that any litigation could be lawful, unless the costs were prepaid. In every suit that is brought, the solicitor hopes to have part of "the gains," if that word includes the costs. But probably "the gains" is intended to refer to the subject of the litigation irrespective of costs; and even if so, in many cases the solicitor has to look to those

"gains" for reimbursement of his costs, or such part of them as may not be recoverable from the opposite party. Yet that could hardly be considered to be champertous even though it were the subject of an express agreement.

In the case under consideration it does not appear that the solicitor sought out the client or was in any way the original promoter or mover of the suit; but simply that when the client came with his case, the bargain was made for remuneration over and above the taxable costs, proportioned to the amount which might ultimately be recovered. Did that constitute a bringing of the suit at his own proper costs to have part of the "gains"? Again, it can scarcely be said that to proportion costs to the amount recovered is in itself champertous, inasmuch as the Court has itself sanctioned what the Chancellor thus calls champerty by fixing the costs of administration and partition proceedings on the basis of the value of the estate in question. We must therefore dissent from the finding of the learned Chancellor as to the alleged champertous aspect of the case.

The method of regulating remuneration by the amount of the property or damages involved has, moreover, been expressly sanctioned in the Province of Ontario by the legislature in regard to conveyancing and other non-contentious business. R. S.O. c. 174, s. 52, authorizes the judges of the Supreme Court of Judicature to make rules as regards the remuneration of solicitors for non-contentious business and expressly provides that this may be "according to a scale of rates of commission or percentage." To fix costs proportionately to the amount recovered has therefore, in these later years, received both legislative and judicial sanction. Let us assume that the case referred to in the beginning of this article had been settled without litigation, the agreement would have been valid under section 54, and the only question would have been whether or not, under the circumstances, it was reasonable. To bargain for more than taxable costs may be illegal, but it cannot be said to be necessarily champertous, even though such extra costs

are to be paid out of the fruits of the litigation. If there is any other reason for illegality it is not suggested in the judgment referred to.

We think it would not be for the benefit of litigants, nor would it be fair to solicitors, to lay down too strict a rule regarding the right of a solicitor to bargain with his client for something more than taxable fees. Such bargains, it is needless to say, are made by reputable solicitors every day with well-to-do clients, as every judge knows from his own professional practice.

Ought there be any different rule where the client is a poor man and unable to supply his lawyer with any funds to prosecute his case? He asks the solicitor to meet all the disbursements of what may be a protracted litigation, and to go to great trouble and expense in preparing the case for trial, for which trouble taxable costs would be a ridiculously inadequate return under the present low tariff. Means should, in some way, be given to enforce any legal right. It surely cannot be the law that because a man is poor and unable to pay a lawyer the necessary fees, his rights should be lost or his wrongs remain unvindicated. But if the above judgment be sound he may practically be helpless, inasmuch as a solicitor may not, without incurring the possible censure of the Court, stipulate for any remuneration whatever over and above his taxable costs, and must run the risk, not only of getting nothing, but also of being out of pocket, and few reputable lawyers would take such risks for merely tariff fees.

If the client is a man of means the solicitor may require to be paid a retainer in cash, and if it is paid, and the nature of the demand properly explained to the client, the Court will not require the solicitor to refund it; but why this should be an unimpeachable transaction, and a bargain to pay at a future time wrong and unenforceable, is one of those anomalies which tend to make one question the reasonableness of the rule now laid down. If the latter transaction be illegal, the demand and payment of a retainer over and above taxable costs ought also

to be illegal, which it is not. Again if you may fix the costs of an administration or partition action at a percentage on the amount realized, why should it not be equally lawful to fix the costs of other actions on the same or a like basis. Clients, of course, should be fully protected against unreasonable bargains, but surely solicitors are also entitled to some protection.

When solicitors are allowed (as they are) to make bargains regarding their remuneration for non-contentious business, and the only test of their validity is their reasonableness, it is difficult to see why they should not have a similar power in regard to matters of litigation. It may be said that the client and solicitor are not always on equal terms in discussing remuneration, for instance, in actions of tort, as the lawyer is much more likely to know the probable result of the suit than the client. But, on the other hand, it is notorious that in such cases clients seldom tell all the facts or correctly state them to their lawyer, and when the case is tried the evidence is often entirely different from the statement given to the solicitor, and consequently, the case is lost.

In *Ford* v. *Mason*, 16 P.R. 25, it was held by Ferguson, J. that R.S.O. c. 174, s. 54, only applies to non-contentious business, and that, therefore, the statute only authorises agreements as to costs for business of that character, but in view of the recent decision of the Court of Appeal in *Clark* v. *Joseph* (1907) 12 K.B. 369, noted ante, p. 651, it would seem that, altogether apart from the statute, there is nothing illegal in a solicitor making a bargain with his client as to his remuneration even in matters of litigation.

We are not convinced that *Ford* v. *Mason* is a correct interpretation of these ill-drawn sections.

The English statute from which R.S.O. c. 174, ss. 52-54 is derived explicitly applies to all kinds of business, and we see no sufficient reason why the Ontario Act should not be amended to correspond with it. If so extended, the statute would afford every necessary safeguard, to the client, when it provides that such agreement must be reasonable and must be in writing.

Under the Manitoba statute such agreements are expressly authorized.

In any view of the matter the sections of R.S.O. c. 174, above referred to, are in their present shape open to doubt, and it is to be hoped that before the statute is again revised the law on the subject may be more clearly and definitely expressed.

EX PARTE AND CONSENT APPLICATIONS.

In the case of *Conway* v. *Fenton*, 40 Ch. D. 518, Kekewich, J., remarked, "I know nothing which requires more careful exercise of judicial power than the deciding on, or granting applications, when there is no real argument; the consent business of the Court being according to my experience, as a rule even more difficult than the contentious business."

What the learned judge there said concerning consent business, is even more true regarding much business which is taken *ex parte*, either where no person is notified, or, being notified fails to attend. But when we sit in the Weekly Courts in Toronto and elsewhere in Ontario and watch how business is there transacted, we are sometimes tempted to wonder whether the presiding judge is always conscious of the difficulty and importance of what he is doing. In mere matters of procedure, much harm may not be done by the slap-dash methods which often prevail; but where a judge is asked to construe wills, or make other orders affecting the substantial rights of parties, we fear there is not now, as there used to be, that solicitous investigation by the judge to see that all proper persons have been duly and properly notified, or that the order asked for is intrinsically right, and proper to be made in the circumstances. We also sometimes wonder whether the part which counsel play in such matters is always quite consistent with their duty to the Court.

It is needless to say that it is no part of the duty of counsel to get orders made which ought not to be made. It is no part

of their duty, nay, they are committing a serious breach of duty, in asking the Court to make orders on obviously insufficient evidence; or to ask the Court to make orders which they know, or ought to know, ought not to be made. The duty of counsel is to assist the Court to come to a right decision in every case which they present to the Court. If all proper parties are not before the Court they should bring that fact to the Court's attention, not that that duty on the part of counsel is any reason why the Court itself should re-lax its vigilance. The Court must take into account the fact that all counsel are not equally learned and capable of giving the Court proper assistance; and that there are some whom it would be no libel to declare to be absolutely ignorant not only of elementary law, but even of their duty to the Court.

We are inclined to fear that it may be found in the future that the present method which some judges have of dealing with business may be productive of some litigation, and probably much hardship to innocent persons. The complaisant judge, anxious to save himself trouble, may then be discovered to have been the suitor's worst enemy and to have lulled those who have waited at his judgment seat into a false security, and on the other hand he may be found to have done gross injustice to innocent parties.

Let us take for instance the case of the construction of a will, where an easy-going judge has undertaken to construe the instrument, in a case where it is open to the heirs to contend that there is an intestacy, and they are not notified, or required to be notified. What may happen is this,—the judge may determine that a doubtfully worded devise is effective. The parties may deal with the property on the faith of that decision and the supposed devisee may sell to a *bonâ fide* purchaser. It may be thought that perhaps the heirs not having been notified would not be bound by the decision, and could assert their rights against the purchaser; if it were so, it would be hard on the purchaser, but it would seem that, under the Jud. Act, s. 58(11) as against a *bonâ fide* purchaser, the order

could not be successfully impeached on the ground of "want of jurisdiction or want of concurrence, consent, notice, or service." So far as the land itself was concerned, therefore, the heirs might have no remedy, even though the decision were absolutely erroneous, and they had had no opportunity of being heard in support of their claim. As regards those who had obtained the order, the heirs might possibly obtain some relief if they happened to be worth anything, but if they were not, the heirs would lose their rights by the action of the Court itself, and be without any redress.

Surely considerations such as these ought to make all judges who are inclined to be hasty or careless a little more considerate, and mindful of the words of Kekewich, J., which we have quoted.

CRIME IN CANADA.

Not by way of boasting of superior virtue, but of warning against imminent danger, we call attention to some figures recently published shewing an alarming increase of crime among people in the United States. Living side by side with a people far greater in wealth and population, but governed by the same laws, speaking the same language, under similar social conditions, and with very close personal relations, it would be only natural that we should be liable to the same temptations, fall into the same errors, and suffer from the same influences which have been the cause of so much alarm on the south-side of the border.

The criminal records of the United States have, therefore, for us a warning which we cannot safely disregard. A writer in the August number of *Case and Comment* makes the following statement. "The record of crime in the United States has gone on increasing in blackness until it has made us conspicuously alone among the civilized nations of the world." And again he says: "This nation standing well-nigh at the head of all the nations in the world in most of the elements of civili-

zation stands far below the worst of them all in its horrible record of crime." In support of this terrible indictment the following figures are given, the city of London being taken as the standard of comparison: "In proportion to population, homicides in New England are 12 times as numerous as they are in London; in California they are 75 times as numerous as in London; while in Nevada they are about 245 times as numerous as in London. That is to say, New England, with nearly a million less inhabitants than London, has 254 homicides annually, while London has only 24; California, with less than one-fourth the population of London, has 422 homicides against 24 in London."

These figures seem scarcely credible, but they have been compiled by the Alabama State Bar Association, and must be accepted as reliable. They refer only to cases of homicide, and we need not assume that the same proportion exists as regards crimes of less serious character. How will this country stand the test of a similar comparison? Taking the criminal statistics of the Dominion officially published for the year 1905, the only ones available, we find that in that year the number of cases of murder which came to trial was 40, and the number of cases of manslaughter was 29. Putting these together under the American designation of homicide we can show 69 cases against 24 in London, the population in each case being sufficiently near for the purpose of comparison. Thus in this favoured country, with all our material prosperity, our freedom from poverty and all such incentives to crime, and our common boast of the law-abiding character of our people, we have to admit a record of this particular crime nearly three times as numerous as that of London with its poverty, degradation, and enormous population of recognized criminals.

From the Province of Ontario, in which we have a more settled state of affairs than in the Western provinces, the figures for the years 1905 and 1906 are as follows: cases of murder, 40, and of manslaughter, 29, the numbers of both class of crimes being more numerous in the former year than in the latter.

Thus for a population of a little over two millions we have for the two years mentioned an average of thirty-one homicides while London with more than double the population had only twenty-four!

That we are not so bad in this respect as the New England States with, in proportion to population, twelve times as many cases of homicide as London, is not any matter for congratulation. Our case is bad enough to call for careful consideration and enquiry into the cause of such a serious state of things. We cannot, as the Americans to some extent may, lay the blame upon our foreign population, for the foreigners who come to our shores are not largely of the criminal class. Some other reason must be sought.

Asking this question with regard to themselves the American writer says: "Probably the chief cause of our extraordinary multiplication of crimes is in the insufficiency of our criminal procedure, coupled with the widespread lack of respect for law and its enforcement." The administration of justice in America is contrasted with the certainty and swiftness of justice in England, very much to the advantage of the latter. The administration of justice in this country has, so far, been both swift and sure as compared with that in the United States, but, as regards respect for law, and a determination that it shall be enforced, we cannot speak with the same complacency. That there is growing up in this country a generation unused to restraint, and unwilling to submit to it, to whom law and order are terms without meaning, allowed from childhood to do as they like, and even taught to shew their independence by disregard of social obligations, we have too much reason to know. Disobedience to parents, disrespect for elders, rudeness to strangers, rowdyism, especially in country districts where there are no police to restrain it, may not bring the offenders within the grasp of the law, but they all tend to create a disrespect for it. Familiarity with disorder causes contempt for order, and prepares the mind for the conception and, in due time, for the execution of crime.

Not only is the ground thus prepared for the growth of a crop of ordinary criminals, but the very foundations of society are undermined by the idea that every man is a law to himself —that he may do what is good in his own eyes, or rather what will serve his own interests—regardless of law and be ready to violate it whenever it may suit his purpose to do so. If there is no sense of moral responsibility there can be no hope for the maintenance of order except in the very strictest enforcement of the letter as well as the spirit of the law.

RUSTICUS.

THE CRIMINAL LIABILITY OF BANK DIRECTORS.

The following extracts from the charge of the Lord Justice Clerk to the jury in the trial of the City of Glasgow Bank Directors which so clearly defined what is the law as to the criminal liability of bank directors will doubtless be interesting to many of our readers:—

"A director of a bank is generally a man who has other avocations to attend to. He is not a professional banker. He is not expected to do the duty of a professional banker. He is a man respected for his position, his character, and the influence he may bring to bear upon the welfare of the bank, for the personal confidence which is reposed in his integrity and in his general ability. Gentlemen, I need not say that it is not part of his duty to take charge of the accounts of the bank. He is entitled to trust the officials who are appointed for that purpose; and as long as he has no reason to suspect their integrity, it is no matter of blame to him that he has done so. It is, indeed, clear that he must to a very great extent trust to the statements of the officials of the bank, acting within the proper duties of the department which has been entrusted to them. Gentlemen, you may assume that it does, however, follow, that where special circumstances arise to bring within the notice of the directors particular interests, that they

have an obligation for inquiry, and an obligation for action which might not be necessarily inferred from the nature of the position they hold. Secondly, as to their knowledge that these balance sheets were fabricated. Now, what the prosecutor has undertaken to prove is,—not that the directors were bound to know the falsity of the statements in the balance sheets, not that they were under obligations to know it, not that they had the means of knowing it, but,—that in point of fact, they did know it. And that is what you must find before you can convict the prisoners on any part of the evidence presented to you. You must be able to affirm, in point of fact—not that they had a duty to do, and they neglected it; not that they had the means of information in their power, and failed to use them, but—that, as a matter of fact, when these balance sheets were issued, they knew that the statements in them were false. Constructive knowledge might be quite sufficient if we were dealing here simply with an action for a civil debt, of a civil reparation;—what a man is bound to know in that case, he is held to have known it. But that is not this case. When a man is charged with crime his crime is guilty knowledge, and nothing else. You must be quite satisfied that not merely it is probable or likely that he knew; but in point of fact, he did know, of the falsification of which he is accused."

Some very able lawyers seem strangely ignorant that there is a third volume of the Revised Statutes of Ontario, 1897, or if not ignorant of its existence, at all events strangely ignorant of what it contains; nor have the law reporters concerned set them right, for we notice that in a recent number of the Ontario Law Reports 22-23 Car. II. c. 10, is referred to as an operative statute, whereas, of course, this reference should have been to R.S.O. c. 335. In a still later judgment a judgment turns on the effect of 13 Edw. I. c. 34, whereas R.S.O. c. 330, s. 9, the really operative statute, is not even mentioned. We may say for

the benefit of anyone who is similarly afflicted, that all the Imperial statutes affecting property and civil rights which had been incorporated into our Provincial law are now to be found in vol. 3, R.S.O. The Imperial statutes above referred to are no longer operative in their original form in this Province. In another recent judgment we notice that 14 Geo. III., c. 78, s. 86, is referred to as though it was in force; whereas the Ontario statute, 7 Edw. VII., c. 23, s. 41, is the operative one.

Whilst we have no love for an elective judiciary, it must be admitted that a much better condition of things in regard to appointment of judges exists in at least one of the States of the Union than in this Dominion. In the State of New York the political parties have come to an understanding that certain of the judges are to be re-elected by acclamation. One is a Democrat and the other a Republican, but both are said to be men of great learning and large judicial capacity as well as of the highest personal character. This simply means that the appointment of these men is taken out of the hands of the politicians. When will that happy time come in Canada? It would be well for the country if the best available men were chosen without reference to politics. The present condition of things is notoriously unsatisfactory. The saying that "to the victor belongs the spoils" should have no place when the appointment of a judge of the land is under discussion. It is a relic of barbarism. Surely a Government so strong as that at present in power might well follow the example of the State of New York especially in view of the fact that their political opponents in days gone by, under the leadership of Sir John A. Macdonald, did appoint eminent men as judges from the ranks of his then political opponents. Looked at merely from the standpoint of expediency in party politics the Government would gain vastly more than it would lose by following the example referred to. Sir John A. Macdonald was not only a patriot, but a sagacious political leader as well.

The Lord Chancellor of England is congratulated by the legal journals there upon his judicial appointments, which, up to the present time, are said to have been most satisfactory to the profession and to the public. The last is that of Lord Coleridge, K.C., to the High Court Bench, as an extra judge to the King's Bench Division. The *Law Times* remarks: "That a grandfather, father and son should become judges of the High Court is probably unprecedented, and we feel sure that the present judge will well sustain the high reputation of two previous generations." This Canada of ours is but a new country, and we cannot as yet point to anything like that; but, a few weeks ago, there was called to the Bar of Ontario the son of one of the greatest of Canadian lawyers, and the grandson of one who was pre-eminent as a judge as well as a statesman. The names of Chief Justice Sir John Beverley Robinson and Christopher Robinson are household words, and they may well be kept prominently before the profession as models for all those who join our ranks. May their high reputation be worthily sustained by this their successor in the third generation.

Lord Brampton, better known as Sir Henry Hawkins, passed off the scene on the 6th ult. He was born Sept. 14, 1817, the son of a solicitor at Hitchin, Hertfordshire. He was well known to the profession and to the public in many important cases, such as the defence of Simon Bernard, who was charged as accessory in a conspiracy against the life of Napoleon III.; in the case of *Roupell* v. *Waite,* in which forgeries to the amount of £350,000 were concerned, and in the defence of various defendants in the Overend and Gurney prosecutions; but the two cases in which he achieved his highest distinction were the Tichborne trials and the case bringing up the will of Lord St. Leonards. He was raised to the Bench in 1876. His severity in many cases gave him the soubriquet of "the hanging judge." Though in many respects an excellent judge, it was at the Bar that he attained his great reputation.

Mr. Geoffrey Hawkins, a brother of the deceased peer, about forty years ago practised in Toronto in partnership with Mr. Columbus Greene.

LUNATICS AND THE RACE PROBLEM.

The report of the Commissioners in Lunacy in England is not very comfortable reading. The commissioners themselves, it is true, strike a somewhat cheerful note, but their figures are hardly reassuring. The percentage of insane patients continues to increase. As regards numbers only, there was a rise in 1906, though it was smaller than in the three previous years. On the basis of population, however, the ratio of officially declared insane subjects was higher than in any other recorded year.

The number under care on the 1st January of this year was 123,988 or 2,009 more than on the corresponding day of last year. The increases for the past few years over each preceding one have been respectively 2,150, 2,630, and 3,235; and the annual average increase for the last ten years has been 2,462, for the last five 2,655.

Again, the ratio of notified insane persons per 10,000 of the population shews a progressive increase. For the year 1906 it was 35.48, which represented an increase of 0.48 on the ratio of the preceding year. In other words, the total number of certified insane persons in England and Wales stood to the estimated population in the proportion of one in 282, whilst the actual numerical increase was 1.64 per cent. Taking the decennial period, the increase in the whole population during the decade was 12.1 per cent., and in the numbers of certified insane it was 24.8 per cent. Lunacy, therefore, seems to be growing faster than the population; but here the commissioners deliver a warning.

There are factors, to be considered (they say), which render it impossible to determine whether the actual proportion of

"occurring" insanity is really increasing in the community; and, if it be so, to what extent? It is probable that far more care is taken to segregate persons suffering from the milder forms of insanity than used to be the case, fitness for such detention being considered to imply the need for treatment of a disease quite as much as the fact that the insane person requires protection from himself, or that the community has to be protected from him; and, again, in the case of the aged, whose numbers go to swell the list of "first attacks," removal to asylums is well known to be on the increase. Hence it happens that, without any actual marked increase in the prevalence of mental disorder, many such defectives are now being notified who, a generation or two ago, would have been left outside the pale of official recognition.

Our readers must extract what comfort they can out of this. The fact cannot be escaped from that since 1859, when records first began to be kept, down to the present time, the statistics of certified insanity in England and Wales have been steadily mounting. Figures given in the report shew that on the 1st of January, 1859, the total number of certified insane under care was 36,672. The figures for 1906 we have already given; they shew the astonishing rate of increase of 237.2 per cent. During the same period, moreover, the population has increased by 77.5 per cent.

Of the 123,988 insane persons at this moment under care, 91,160 are in county or borough asylums, 4,323 in registered hospitals, 1,685 in metropolitan licensed houses, 1,846 in provincial licensed houses, 164 in naval and military hospitals, 817 in criminal lunatic asylums (of which there are now two, an establishment having just been opened at Parkhurst convict prison), 1,125 in ordinary workhouses, 6,679 in metropolitan district asylums, 494 private single patients, and 5,595 out-door pauper patients, and 9,889 private patients. The criminal lunatics (736 males, 227 females) have increased by forty-two, the total under care on the 1st of January, 1907, being 963, of whom 147, or 15.2 per cent., were in county and borough asylums, where there was one more patient than last year. The

opening of the Parkhurst Asylum accounts for the additional forty-one in excess of last year's figures, all of these being males.

As regards the geographical distribution of the increase, the six counties in which the highest annual increases have taken place for the last five years are London (630), Middlesex (115), Essex (108), Glamorgan (seventy-three), Kent (sixty-eight), and Surrey (sixty-seven). Glamorgan excepted, these, it will be perceived, are all metropolitan counties. Among the boroughs, the highest average annual increase has been in Manchester (seventy-two), West Ham (forty-six), Liverpool (forty-two), Salford (forty-one), Leeds (thirty-six), and Plymouth (thirty-four).

It is hard for a nation to recognize, and still harder for it to admit, a decay of mentality, but facts have to be met in the long run. The progress of insanity in this country during the past fifty years is a problem that ought not to be shirked. The longer it is evaded the more serious is it likely to become. The figures of the commissioners' report are not of a kind to create general alarm, but they are unquestionably bad, and if the situation they reveal is persistently neglected it must grow worse. A medical man attached to the staff of a public lunatic asylum, interviewed the other day on the subject of this report, asserted that the explanation of the increase of lunacy is to be sought elsewhere than in national drinking, or in the rush and worry and strenuousness of modern life. "The real cause, I consider," said he, "is the care we take of degenerates. In savage countries there are no lunatics, because the savages knock on the head the physically unfit, or leave them to perish by the wayside. We do all we can to preserve them, to restore them, if possible, to their homes and companions."

This goes to the root of the matter. We are all familiar with the suggestion of another very eminent medical man, that in certain cases the unfit should be disposed of in the lethal chamber. This the public will not stand; but the authority just cited observes that if we refuse to put out of the way the physical and mental degenerates who are multiplying every year, we

should at least do our utmost to prevent them from coming into the world. "People should not be allowed to get married unless they can produce a certificate of health."

The commissioners state in their report that "by far the majority of the discharged left the asylum within two years of being admitted." Now, there is nothing in the law to prevent ex-patients of lunatic asylums, public or private, from getting married and bringing into the world children who must be in some degree diseased. But this is a monstrous abuse of the privilege of marriage, and a very dangerous one to the community. We should restrain by all the means in our power the marriage of the degenerate. Every sound theory of race culture is inimical to it; yet we spend annually upon the up-keep of the insane and degenerate over £30,000,000—an enormous sum that is wholly unproductive. We have between 18,000 and 19,000 married and widowed imbeciles and feeble-minded; while the educated and "high-grade degenerates"—who are far more harmful to the race than the irreclaimable idiot—are increasing among us. "He who is born into this sad heritage," writes a modern expert, "leaves hope behind. We cannot cure what is not disease but defect, and that which the cradle rocks the spade will cover." Dr. Reid Rentoul has well said that breeding from degenerates has never yet paid a nation and never will pay. "The existing conditions compel thinking men and women to agree to this—that the preservation of the supposed rights of individual idiots, imbeciles, epileptics, lunatics, feeble-minded, and habitual criminals, in order that they may beget offspring, is but of very secondary importance when considered in connection with the future welfare, the mental and physical strength of our nation." And as long as we are engaged in polluting at its source the river of national health, we cannot expect to be greatly flattered by the reports of the Commissioners in Lunacy.—*Law Times.*

The reports of the prison chaplains—Church of Ireland, Roman Catholic, and Presbyterian—which form an appendix to the annual report of the General Prisons Board in Ireland, make what will probably seem to the cynical very amusing reading. If one is to judge from these reports, there is no more God-fearing, devout, and religious body of men than the convicts who filled the Irish prisons last year. They, without exception, appear to be extraordinarily attentive to their religious duties, and particularly responsive to religious instruction. One of the chaplains says boldly: "I look upon it as a blessing for some people to be put in prison, because it is the only time they make any attempt to attend to their religious duties." Another says: "It is, I think, greatly to be desired that longer sentences were imposed by the magistrates. As matters are now, a prisoner has not time to have the drink craze eliminated from his system before his 'time is up,' and he goes out to get a new drink and incur a fresh sentence." A third chaplain says: "There is hardly another congregation so critical as convicts. Men, who whilst at liberty rarely enter a church, become quite fastidious in their taste, and profess themselves actuated with singular zeal for the beauty of God's house, when they have become by their crimes the inmates of a jail." The board in their report refer very appositely to the new Habitual Criminals Act of New South Wales, which provides that when a person has been convicted on indictment four times in respect of similar classes of offences, he may, on the occasion of the fourth conviction, be declared to be an habitual criminal, and be treated accordingly. It is satisfactory to observe that the proportion of the total daily average of prisoners in Irish prisons to 100,000 of the population fell from sixty-four in 1898 to fifty-eight in 1906.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

WILL—CONSTRUCTION—VESTED LEGACIES—INTEREST UNTIL PAYMENT—GIFTS TO PERSONS BORN BEFORE DATE OF WILL—INFANT EN VENTRE SA MERE—PAYMENT INTO COURT BY TRUSTEES—TRUSTEE ACT, 1893, (56-57 VICT. C. 93) S. 42—(R.S.O. C. 336, S. 4(3)).

In re Solaman De Pass v. *Sonnenthal* (1907) 2 Ch. 46. The testator had left a number of legacies of £500 to each of his great nephews and great nieces "born previously to the date of this my will." He then gave his residuary estate to trustees upon trust for sale or conversion, and, after payment of debts and testamentary expenses, to divide the surplus as therein mentioned. A large number of the legatees were infants, and the will declared that all legacies should carry 4 per cent. interest. The trustees were desirous of appropriating a certain part of the estate to meet the legacies, and they also desired the opinion of the Court as to whether a great niece, who was en ventre sa mère at the date of the will, was entitled to a legacy; and Kekewich, J., held that the trustees could not free the residuary estate by setting apart proper securities to meet the legacies, but they could pay the legacies into Court under s. 42 of the Trustee Relief Act, 1893, (R.S.O. c. 336. s. 4(2)) when the clause as to interest would cease, and as to the child en ventre sa mère, he held that she was not entitled to a legacy, as the persons whom the testators intended to benefit, were persons of whose existence he knew, and who in the ordinary sense of the word were "born" at the date of his will.

WILL—EXPRESS TRUST OF RESIDUE—PARTIAL FAILURE OF BENEFICIAL INTEREST—NEXT OF KIN—ADVANCEMENTS BY TESTATOR TO CHILDREN—HOTCHPOT—STATUTE OF DISTRIBUTION (22-23 CHAS. II. C. 10) S. 5—(R.S.O. C. 335, S. 2.).

In re Roby, Howlett v. *Remington* (1907) 2 Ch. 84. The doctrine that the Statute of Distribution, s. 5 (R.S.O. c. 335, s. 1), does not apply in cases where there is only a partial intestacy, was reaffirmed by Neville, J., in this case. By a will

a testator bequeathed the residue of his estate to his executors in trust, as to £1,500 (part thereof) to invest and pay the income to his daughter, E. M. Clark, for her life, and after her death, to divide the capital amongst her issue; there was no gift over of the £1,500. E. M. Clark died without issue, and there was, consequently, an intestacy as to the £1,500 which, accordingly, passed to the next of kin, who were four daughters and some grandchildren of the testator. These daughters had received large advances from the testator, and if they were brought into hotchpot the £1,500 would all go to the grandchildren, but Neville, J., held, that there being only a partial intestacy, the Statute of Distribution did not apply, and the advances were not liable to be brought into hotchpot; and he also held, that the case was not within the Executor's Act, 1830, as the £1,500 was held by the executors not as executors, but as trustees.

EMPLOYER AND WORKMAN — INJURY TO WORKMAN CAUSING DEATH—AGREEMENT BETWEEN EMPLOYER AND WORKMAN—CLAIM BY DEPENDENT.

Williams v. *Vauxhall Colliery Co.* (1907) 2 K.B. 433 is also a case under the English Workmen's Compensation Act, 1897, which may also be useful in considering the Fatal Accidents Act (R.S.O. c. 166). In this case after an accident in the course of his employment the workman made an arrangement with his employer out of Court whereby he received for a certain time after the accident a weekly payment, and then, believing himself to have recovered, returned to work, nothing being said on either side as to the continuance or cessation of the compensation. He subsequently died from the effects of the injury. These circumstances the Court of Appeal (Cozens-Hardy, M.R. and Barnes, P.P.D. and Kennedy, L.J.) held afforded no evidence that the workman had abandoned his right against his employer to further compensation; and, even assuming that the workman had abandoned his right, his dependents had a separate right to compensation of which he could not deprive them. But, subject to this, the Court held that the employer was not liable for more than the maximum compensation allowed by the Act, and was entitled to credit for the sums advanced to the deceased workman.

SHERIFF — EXECUTION — FIERI FACIAS — SEIZURE — MONEY BROUGHT INTO HOUSE AFTER SHERIFF IN POSSESSION.

In *Johnson* v. *Pickering* (1907) 2 K.B. 437 it became necessary to determine whether or not certain money of an execution debtor was to be deemed to have been taken in execution. Under a fieri facias the sheriff had seized all the goods in the debtor's house, and while the sheriff was in possession the debtor, unknown to the sheriff, brought into the house and deposited in a drawer in his bedroom £395 in bank notes. Subsequently the debtor died, and an order was made for administration of his estate. The sheriff being unaware of the existence of the bank notes had done no overt act of seizing the same. In these circumstances Lawrance, J., held that the sheriff must be deemed to have taken the money in execution, as his overt act at the date of the seizure shewed an intention to seize all the goods, and coupled with his remaining in possession, was enough to constitute a seizing and taking of goods subsequently brought on the premises whilst he was in possession.

WILL—CONSTRUCTION—GIFT TO CHILDREN AS A CLASS—SUBSTITUTIONAL GIFT TO ISSUE—"SHALL PREDECEASE ME"—ISSUE OF CHILD DEAD AT DATE OF WILL.

Gorringe v. *Mahlstedt* (1907) A.C. 225 is a case known in the Courts below as *In re Gorringe, Gorringe* v. *Gorringe,* and was for the construction of a will whereby the testator gave legacies to the children of one of his sons whom he described as "my deceased son;" and he gave the residue to his children who should be living at his death, "provided that in case any one or more of my children shall predecease me having any child or children living at my death, then such child or children of my deceased child shall take the share which the parent would have taken if such parent were living at my decease." The simple question for decision was whether or not the children of the son, who was dead at the date of the will, were entitled to share in the residue. Joyce, J., held that they were not, (1906) 1 Ch. 319 (noted ante, vol. 42, p. 338). The Court of Appeal reversed his decision, Romer, L.J., dissenting (1906) 2 Ch. 341 (noted ante, vol. 42, p. 712). The House of Lords, (Lords Halsbury, Macnaghten, James, and Atkinson), have reversed the Court of Appeal and restored the judgment of Joyce, J.

COMPANY—REDUCTION OF CAPITAL—DISCRETION OF COURT, HOW TO BE EXERCISED.

Poole v. *National Bank* (1907) A.C. 229 was an application to the Court to sanction the reduction of the capital of a limited company, which, in view of the recent Companies Act, 7 Edw. VII. c. 34, s. 13(O), it may be useful to note, though, under the latter Act, the application for reduction is to be made to the Lieutenant-Governor and not to the Court. The proposed reduction had been sanctioned by Farwell, J., and his decision had been affirmed by the Court of Appeal. The House of Lords have now affirmed the decision, holding that on such applications it is not essential to shew that the capital which the company proposes to cancel has been lost, and that where creditors are not concerned, the questions to be considered on such applications are: (1) whether out of regard to the public, who may be induced to take shares, the sanction should be refused, and, (2) whether as between the different class of shareholders the proposed reduction is fair and equitable.

ADMIRALTY—COLLISION—DREDGER—MEASURE OF DAMAGES.

Mersey Docks v. *Marpessa* (1907) A.C. 241 was an action in the Admiralty Court to recover damages for a collision, and the sole question on this appeal to the House of Lords was what was the proper measure of damages. The plaintiffs' vessel was a dredger, used in dredging sand in a harbour, and was injured by a collision with the defendants' ship, which was in fault. The dredger cost much to maintain and earned nothing, it was rendered useless for nine days. Besides the cost of repair the plaintiffs claimed for the value of the work which would have been done by the dredger but for the damage to it, and also a sum for owner's profit; but the House of Lords agreed with the Courts below that though the plaintiffs would have been entitled to recover the cost of hiring another vessel to do the work, they, not having done so, were not entitled to claim anything for owner's profit; but, besides the cost of repair, they were entitled to recover the value of the services of the dredge, which might be reasonably estimated at the amount of the daily cost of operating it for nine days.

SHIP—CHARTERER—BILL OF LADING INCREASING LIABILITY OF SHIPOWNER—INDEMNITY BY CHARTERER.

Kruger v. *Moel Tryvan Ship Co.* (1907) A.C. 272 is the case known in the Courts below as *Moel Tryvan Ship Co.* v. *Kruger* (noted ante, pp. 245 and 498). It may be remembered that the question was whether the charterers of a ship were bound to indemnify the shipowners in respect of a liability occasioned by the master having signed, at the request of the charterers, a bill of lading imposing on the shipowners a liability from which, under the charter party, they were exempt. The Courts below held that they were, and the House of Lords (Lord Loreburn, L.C. and Lords Halsbury and James) have affirmed their decision.

AGREEMENT NOT TO ERECT "UNSEEMLY" BUILDING.

Murray v. *Dunn* (1907) A.C. 283, although an appeal from a Scotch Court, is, nevertheless, deserving of attention. The action was to enforce an agreement whereby the defendant had bound himself not to erect an "unseemly" building on his premises adjoining those of the plaintiffs. The House of Lords (Lords Halsbury, Hereford, Robertson, and Atkinson) affirmed the judgment of the Scotch Court, that the agreement was too vague and uncertain to be enforced in a Court of law.

INTERIM INJUNCTION TOO WIDE—MEASURE OF DAMAGES.

The Clippens Oil Co. v. *Edinburgh & District Water Co.* (1907) A.C. 291 is also an appeal from a Scotch Court. Applying to the case the language of English law, the facts were that the respondents had obtained what in English law is called an injunction against the appellants working certain minerals within forty yards of the respondents' water pipes. The injunction continued in force eleven months and was then dissolved. The appellants' capital was limited and prices were low, and the appellants were unable to obtain minerals from any other source which would have been profitable. In these circumstances, they closed their works, their machinery deteriorated, their business connections were lost, and it was found impossible to resume business after the dissolution of the injunction. They claimed £137,000, and were allowed £27,000, which they contended was inadequate. It may be mentioned

that the respondents were entitled to an injunction against the appellants working the minerals in question so far, only, as it would interfere with the support of their water pipes, but the injunction granted restrained the appellants from any working at all within the specified area. In the circumstances the House of Lords (Lord Loreburn, L.C., and Lords James, Robertson, Atkinson, and Collins), considered that it was like the common case where a jury is asked to assess damages with no fixed rule, and few ascertained facts to guide them, and though some of their Lordships appear to have doubted whether the damages allowed were not excessive, nevertheless, they refused to interfere with the assessment of the Court below.

ONTARIO ACT, 55 VICT. C. 99—TORONTO STREET RAILWAY—CONSTRUCTION.

Toronto v. *Toronto Railway* (1907) A.C. 315 is a case which has been much discussed in the daily press of Toronto. As is well known, it turns upon the construction of the Toronto Street Railway Act, 55 Vict. c. 99, giving parliamentary sanction to the agreement entered into between the railway and the city. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, and Collins, and Sir A. Wilson) have determined that the railway is not compellable to extend its tracks beyond the limits of the city as they existed at the date of the agreement. Secondly, that it cannot be compelled by the city to lay down tracks even within that area, and is not liable in damages for refusing to do so, but that the sole penalty for their refusal is that stipulated in the agreement, viz, that they thereby forfeit the exclusive right in any street in which they refuse to lay down tracks when called on to do so by the city; and thirdly, that the exclusive right to operate the railway conferred on the company involves the right to determine the routes of the cars and the places at which stops are to be made, which could not be interfered with by the city. The second point is one of general interest, and is important.

HIGH TREASON—RESIDENT ALIEN'S DUTY OF ALLEGIANCE.

In *De Jager* v. *Attorney-General of Natal* (1907) A.C. 326 the Judicial Committee of the Privy Council (The Lord Chancellor and Lords Macnaghten and Atkinson and Sir A. Wilson) hold that where an alien resident within British territory

assists invaders during the absence of the British forces, he is guilty, and may properly be convicted, of high treason; and that there is no law relieving an alien from his duty of allegiance because an enemy temporarily makes good his military occupation of the district in which the alien resides.

NUISANCE—STATUTORY POWERS.

Demerara Electric Co. v. *White* (1907) A. C. 330. This was an appeal from the Supreme Court of British Guiana. The point in contention was whether the appellants were liable in damages for a nuisance caused by the vibration and noise of their machinery. The appellants acquired on the same day, under a colonial ordinance, and for the same local area, exclusive power to generate electricity for lighting and supplying electric energy for all purposes, public and private, and also under another license power to generate electricity, wherewith to operate an electric railway. The first license expressly declared that the appellants were to be liable for any nuisance caused by them, the tramways license, however, did not contain any similar stipulation, and the appellants contended that under the second license they were exercising statutory powers, and were exonerated from liability for any nuisance which might be occasioned by their so doing. But their Lordships of the Judicial Committee of the Privy Council (The Lord Chancellor, and Lords Macnaghten, and Davey, and Sir A. Wilson) say: "It is quite true that the condition imposed by section 66 of the lighting order is not repeated in the license. It appears to their Lordships, however, impossible to infer from this circumstance that in connection with one of the two main purposes for which electricity was required by the appellants they are, by implication, relieved from any obligation imposed by a contemporaneous instrument, and accepted by them as applying to the production of electricity for every purpose, motive power, as well as lighting and heating."

LEAVE TO APPEAL—SPECIAL TERMS IMPOSED.

Commissioners of Taxation v. *Mooney* (1907) A.C. 342 deserves attention as illustrating the special conditions which may be imposed on granting special leave to appeal to His Majesty in Council. By an Australian statute, for the purpose

of taxation, persons are required, if called on by the proper authority, to make a return of their income, and in default of making a return, the municipal authority may make a default assessment which is to be conclusive. The respondent had failed to make a return of his income when called on, and the plaintiffs had assessed him in default of such return, on which he was taxed £225, which amount the action was brought to recover. The Court below had held that the default assessment was not conclusive, and it was against this judgment that leave to appeal was given. The Judicial Committee, although allowing the appeal, and holding the respondent legally liable for the taxes so assessed, yet made it a condition of their judgment allowing the appeal, that the plaintiffs' judgment should be reduced to a nominal sum, and that they should pay the respondent's costs of the appeal as between solicitor and client.

JUSTICES—QUARTER SESSIONS—JURISDICTION OF HIGH COURT—PRACTICE—STATED CASE—DECISION OF JUSTICES FINAL.

In *Kydd* v. *Watch Committee of Liverpool* (1907) 3 K.B. 591, a statute provided that in certain cases specified the party aggrieved might appeal from the decision of a police board to the Court of Quarter Sessions, whose decision should be final. On such an appeal being brought the Recorder decided in favour of the appellant, but gave his decision in the form of a special case. The Divisional Court (Lord Alverstone, C.J., and Darling and Phillimore, JJ.) held, that there was no jurisdiction to entertain the case, relying on *Westminister* v. *Gordon Hotels* (1907) 1 K.B. 910, but the Court of Appeal (Williams, Moulton, and Buckley, L.JJ.) considered that the case was not governed by that decision which was the case of a case stated by magistrates, which they considered differed from a case stated by quarter sessions and governed by a different statute, and they therefore reversed the decision of the Divisional Court.

WATER—SUPPLY FOR DOMESTIC PURPOSES—WATER FOR WASHING MOTOR CAR USED IN BUSINESS.

In *Harrisgate* v. *Mackay* (1907) 2 K.B. 611, on a case stated by justices, a Divisional Court (Lord Alverstone, C.J., and Darling, and Lawrence, JJ.) held that water supplied to and used by a medical man for washing a motor car used in the practice of his profession, was water supplied for "domestic purposes" within the meaning of a statute.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] LOGAN *v.* LEE. [Oct. 3.

Evidence—Provincial laws in Canada — Judicial notice by Supreme Court of Canada—R.S.C. (1906) *c.* 145, *s.* 17.

As an appellate tribunal for the Dominion of Canada, the Supreme Court of Canada requires no evidence of the laws in force in any of the provinces or territories of Canada. It is bound to take judicial notice of the statutory or other laws prevailing in every province or territory in Canada, even where they may not have been proved in the courts below, or although the view of the judges of the Supreme Court of Canada may differ from the evidence adduced on those points in the courts below. *Cooper* v. *Cooper*, 13 App. Cas. 88, followed.

Atwater, K.C. and *Duff*, for appellant. *Lafleur*, K.C. and *Paget Aylmer*, for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX *v.* ARMSTRONG. [Sept. 23.

Criminal procedure—Evidence of girl under 14*—Understanding the nature of an oath.*

Upon a stated case the question was whether a girl under the age of 14 years appeared sufficiently to understand the nature of an oath to justify the magistrate in receiving her

testimony under oath. The magistrate stated that having examined the girl regarding her knowledge of the nature of an oath he found that she did understand it, and there was nothing in her answers, as reported, to questions addressed to her by the magistrate and counsel, to indicate that she did not understand. It appeared that she had been attending school and the handwriting of her signature to the depositions was good.

Held, that there is no good reason for saying that the magistrate was wrong in receiving the girl's evidence under oath, and the fact that she had been instructed on the subject a few days before the trial afforded no sufficient ground for holding that her testimony was not to be admitted under oath.

W. G. Wilson and *F. M. Field,* for the accused. *Cartwright,* K.C., for the Crown.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P., MacMahon, J., Magee, J.] [Sept. 16.

HAMILTON *v.* HAMILTON, GRIMSBY, AND BEAMSVILLE ELECTRIC R.W. Co.

Costs—Taxation—Counsel fee—Trial or assessment of damages —Interlocutory judgment—Items 152, 153, *of tariff of costs.*

In an action for damages for personal injuries, the defendants entered no appearance and filed no statement of defence. Interlocutory judgment was not signed, and there was no admission of the liability of the defendants. Notice of assessment was served by the plaintiff by posting it up in the office of the Court. Both the plaintiff and defendants issued commissions and took evidence abroad, and the defendants obtained an order for the examination of the plaintiff by medical practitioners. On the opening of the case at the trial (or assessment) counsel for the defendants admitted that they did not intend to contest liability, and the only matter tried out was the quantum of damages.

Held, that the plaintiff was not limited, in taxing costs against the defendants, to the counsel fee mentioned in item

152 of the tariff as appropriate upon a mere assessment of damages, but was entitled to a counsel fee as upon a trial, as provided in item 153; the assessment referred to in item 152 being that which follows upon an interlocutory judgment.

Semble per MEREDITH, C.J.C.P., that the paragraphs which follow items 152 and 153 in the tariff are intended to give the taxing officer a discretion to increase the fee for the brief both for the assessment of damages and for the trial.

Order of FALCONBRIDGE, C.J.K.B., affirmed.

Gauld, for defendants. *Duff*, for plaintiff.

Meredith, C.J.C.P., MacMahon, J., Magee, J.] [Sept. 17.

LOUDEN MANUFACTURING COMPANY *v.* MILMINE.

Infant—Action against, for price of goods—Acknowledgment—Ratification—Repudiation—Liability for value of goods—Amendment—Costs.

Held, affirming the judgment of RIDDELL, J., 14 O.L.R. 532, that the letter relied upon by the plaintiffs as a ratification, after majority, of the defendant's contract made when he was an infant, was not sufficient; but, in this reversing the judgment, that the defendant was liable for the value of the goods which he had in possession at the time he repudiated the contract; and the plaintiffs were allowed to amend by setting up an alternative claim for such value, and to enter judgment for the amount thereof without costs.

McKinnon, for plaintiffs. *Farmer*, for defendant.

Cartwright, Master.] [Oct. 1.

COATES *v.* THE KING.

Petition of right—Amendment—Consent of Crown.

Held, on an application by the suppliants for leave to amend the petition of right under rule 929, that the rules as to amend-

ments do not apply, as the Court has no power to amend a petition of right without the consent of the Crown and that any proposed amendment must be first submitted to the Lieutenant-Governor and approved of by him.

F. Aylesworth, for suppliant. *N. Ferrars Davidson*, for the Crown.

Mulock, C.J. Ex., Anglin, J., Clute, J.] [Oct. 4.

RE VILLAGE OF NEWBURGH AND COUNTY OF LENNOX AND ADDINGTON.

Municipal law—Liability of county for maintenance of bridge.

Appeal by the county from the judgment of the county judge who found that the county was required to build and maintain certain bridges crossing the Napanee River in the Village of Newburgh. The river in question, where it passes through the Village of Newburgh, divides into two channels, which re-unite, enclosing an island. These two channels at that point constitute the river. The river is more than 100 feet in width above and below the island. The road, which it is admitted, is a highway leading through the county, passes over these channels by bridges. The channel crossed by one bridge is 38 feet in width, and the channel crossed by the other bridge is 80 feet in width. The island contains 5 or 6 acres. The question was, whether, under the Act, the county council had exclusive jurisdiction over these bridges. The statute declares that the county council shall have exclusive jurisdiction over all bridges crossing streams or rivers over 100 feet in width.

Held, that the statute has reference to the width of the river, and not to the length of the bridge. The two channels of the river being together, admittedly over 100 feet in width at the place where it is crossed by the bridges in question, the matter is concluded. The case is one clearly within the purview of the statute. See *Regina* v. *County of Carleton*, 1 O.R. 277.

McIntyre, K.C., for appellants. *Whiting*, K.C., for village corporation.

Falconbridge, C.J.K.B., Britton, J., Riddell, J.] [Oct. 4.

MAXON *v.* IRWIN.

Bills and notes—Alteration—Word "renewal" in margin erased —Bills of Exchange Act, s. 145.

Action in a Division Court, County of Essex, on a promissory note which had been altered by erasing the word "renewal" in the margin. Appeal to a Divisional Court.

Held that as the note was in the hands of a holder in due course the plaintiff should recover under s. 145 of Bills of Exchange Act.

Per FALCONBRIDGE, C.J.K.B.:—The alteration in the note was material: *Pigot's Case,* 11 Co. 27; *Master* v. *Miller,* 4 T.R. 320; *Davidson* v. *Cooper,* 13 M. & W. 343; *Suffell* v. *Bank of England,* 9 Q.B.D. 555; *Knill* v. *Williams,* 10 East 431; *Garrard* v. *Lewis,* 10 Q.B.D. 30. But the alteration was not apparent: *Leeds Bank* v. *Walker,* 11 Q.B.D. 84; *Scholfield* v. *Earl of Londesborough* (1896) A.C., 514; *Cunnington* v. *Peterson,* 29 O.R. 346.

J. H. Rodd, for plaintiffs. *Clarke,* K.C., for defendant.

Riddell, J.] KING *v.* BARTELS. [Oct. 5.

Habeas corpus—Escape of prisoner—Recapture—Issue of writ.

If a prisoner who has applied for a writ of habeas corpus, escape after the issue of such writ and pending the argument upon its return, and thus himself puts an end to the detention, he thereby waives all right which he might have had under the writ, and no order can be afterwards made for his release.

If, however, in such a case he be recaptured or surrender himself again into custody the Court is precluded from granting him another writ of habeas corpus under proper circumstances.

Dewart, K.C. and *Sommerville,* for prisoner. *T. D. Cowper,* for the State of New York.

Boyd, C., Maclaren, J.A., Mabee, J.] [Oct. 22.

McCLELLAN *v.* POWASSAN LUMBER COMPANY.

Way — Private way — Easement — Extinguishment by unity of ownership—Revival on severance—Implied reservation—Land Titles Act.

Unity of ownership or seisin in fee extinguishes all pre-existing easements or private rights of way over one part of the land for the accommodation of another part; and an easement so extinguished can only be revived by a fresh grant, and then the right granted is of a new thing; the severance again of the land in respect of which an easement formerly existed over one part for the benefit of the other does not *per se* revive the extinguished easement, if the dominant part is first granted and the servient part retained by the owner who made the severance. *Wheeldon* v. *Burrows*, 12 Ch.D. 31, followed.

Previous to 1891 two adjoining parcels of land, known as the grist mill property and the saw mill property, were in different holders, and there was on the land, well defined on the ground, a road leading from the highway to the grist mill over a part of the saw mill property. In 1891 the two properties became united in the same owners, who, in 1894, conveyed all the land, excepting certain lots, on one of which stood the grist mill. In the document of transfer there were no words to indicate that any right of way over the rest of the land conveyed was also excepted. The grist mill property was afterwards conveyed to the plaintiff, who claimed the right to use the road over the saw mill property as marked upon the ground:—

Held, that when the transfer of 1894 was made, the road was not a subsisting easement or right of way, though it was marked upon the ground as a former right of way, which continued to be used for the convenience of the owner of the whole property after he became such owner; failing an express reservation in the transfer of 1894, none was to be implied; and the fact that the title to all the lands in question had been brought under the Land Titles Act made no difference, there being nothing in the provisions of section 26 or other sections to affect the result in the plaintiff's favour; Mabee, J., dissenting.

Judgment of Teetzel, J., reversed.

Armour, K.C., and *J. McCurry*, for defendants. *Laidlaw*, K.C., for plaintiff.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] SLATER *v.* RYAN. [Oct. 1.

Trade name—Imitation—Defendant using his own name—Injunction.

Appeal from judgment of Mathers, J., noted ante, p. 293.

The Court, while expressing the opinion that the advertisement, in the form in which it had appeared, would, if persisted in, have meant an infringement of the plaintiffs' trade name, held, that the appeal should be dismissed on the ground that the action had been commenced before any complaint was made and sixteen days after the defendant had, of his own accord, withdrawn the advertisement, and that it had not been inserted by the defendant himself, but by his advertising agent, and that the defendant had withdrawn it as soon as it came to his knowledge. Under such circumstances the discretion the trial judge had exercised in refusing an injunction should not be disturbed.

No costs of the appeal to either party.

Hoskin, for plaintiffs. *Aikins,* K.C., for defendant.

Full Court.] THE KING *v.* EDWARDS. [Oct. 8.

Criminal law—Criminal Code s. 386*—Summary trial by police magistrate under s.* 777*—Punishment—Previous conviction as ground for increasing term of imprisonment.*

The prisoner elected to be tried summarily before the police magistrate of the City of Winnipeg and pleaded guilty of theft of a sum exceeding two hundred dollars. The magistrate then asked him if he had been previously convicted of theft and he admitted that he had, whereupon the magistrate sentenced him to ten years' imprisonment in the penitentiary. There was no reference to such former conviction in the information upon

which the prisoner had been arrested. The prisoner then, pursuant to sub-s. 2 of s. 1016 of the Code, moved the Court of Appeal to pass a proper sentence, alleging that the sentence of ten years was one which could not by law be passed.

Held, by analogy to the procedure on indictments, the magistrate had no right to take the previous conviction into account, as it had not been referred to in the information, and the Court of Appeal could now pass what it considered should be a proper sentence. That, when there has been no reference to a previous conviction in an indictment or information, neither a magistrate nor a judge, in considering what sentence, within the ordinary maximum, he should impose upon a convicted prisoner, can properly take into account any previous convictions or allow the Crown prosecutor to give any proof of them.

The prisoner was then asked whether he had anything to say why sentence should not be passed upon him according to law. In addressing the Court in reply the prisoner admitted the previous conviction referred to, but said that he had received a full pardon very shortly afterwards. The Court then intimated that the sentence should be as upon the first offence only, and sentenced the prisoner to two years' imprisonment in the penitentiary.

Patterson, for the Crown. *Potts* and *Bonnar*, for the prisoner.

KING'S BENCH.

Richards, J.] CALLOWAY v. PLATT. [August 29.

Title—Evidence required to prove adverse possession—Claim set up by wife living with husband—Amendment to aid claimant.

This was an issue directed to be tried under the Real Property Act, R.S.M. 1902, c. 148; to determine whether the plaintiff had acquired title to the lots in question by ten years' adverse possession under R.S.M. 1902, c. 100, as against the defendants who had the paper title. The evidence of the plaintiff and her family went to shew exclusive possession of the property by

either the plaintiff, her husband, or tenants under leases, for over twenty years. The lots were part of a field which was surrounded by a fence placed there by a former owner of the field prior to the twenty years and before the plaintiff and her husband had begun to exercise any acts of adverse possession. The plaintiff had in 1882 acquired title to three of the lots and to a dwelling thereon and she and her family had lived in that house until 1891 when it was destroyed by fire. They rebuilt on the three lots in 1900 and lived there again from that time onwards. The plaintiff's husband had from time to time made slight repairs to the fence referred to. The taxes had been paid by the defendants or their testator. There was very little evidence outside of that of the plaintiff and her husband and other members of the family to corroborate their statements as to the alleged possession.

Held, 1. A party asserting a title to land by adverse possession should prove it most clearly. Although there is no statutory requirement that the evidence of such parties and of the members of their families must be corroborated, unless such evidence appears to be correct beyond reasonable doubt, it would be unsafe to hold that a title by possession has been gained in the absence of strong additional evidence of disinterested witnesses; and the evidence in this case was not sufficient for that purpose.

2. Permission should not be given, even if the judge had power to allow it, to amend the issue by setting up that the husband had acquired a title by possession and had given the plaintiff a quit claim deed of the property, for no one claiming a title by length of possession is entitled to any such indulgence from the Court.

Sanders v. *Sanders,* 19 Ch.D. 373, distinguished.

Hough, K.C., and *Robson,* for plaintiff. *Machray,* and *Dennistoun* for defendants.

Mathers, J.] CAMPBELL *v.* IMPERIAL LOAN CO. [Sept. 14.

Mortgagor and mortgagee—Redemption—Real Property Limitation Act—Constructive possession by mortgagee of vacant land—Acknowledgment to prevent statutory bar.

Action for redemption of a mortgage in fee of the lands in question given by plaintiffs' predecessor in title. The mortgage

became in default Jan. 1, 1892. The land was vacant, and by the terms of the mortgage the mortgagor's right to possession ceased upon default, but the mortgagees had not taken actual possession.

Held, following *Rutherford* v. *Mitchell,* 15 M.R. 390, that the mortgagees should be deemed to have "obtained possession" of the land within the meaning of section R.S.M. 1902, c. 100, s. 20, at the time of the default, and that the right to redeem was barred in ten years from that time.

Held, also, that the posting up on the lands, in September, 1903, of a notice of exercising the power of sale contained in the mortgage, even if it could be treated as "an acknowledgment in writing of the title of the mortgagor or of his right to redemption" within the meaning of the same section, would not have the effect of reviving the plaintiff's title or right to redeem which had already been barred. *Show* v. *Colter,* 11 O.R. 630.

A. J. Andrews and *Burbidge,* for plaintiff. *Aikins,* K.C., *Haggart,* K.C., *Caldwell,* K.C., *Kilgour,* and *Sullivan,* for respective defendants.

Mathers, J.] CHATWIN v. ROSEDALE. [Sept. 14.

Municipality—Construction of drain causing damage to plaintiff's land.

In 1893 the council of the defendant municipality caused the construction of a ditch and breakwater which diverted large quantities of water from a creek called Snake Creek into a smaller creek called Eden Creek, running through plaintiff's land. The capacity of Eden Creek was in some years not sufficient to carry the additional load thus put upon it, and in 1902 and in 1904, it overflowed and flooded plaintiff's land. This would not have happened but for the ditch and breakwater referred to.

Held, that the municipality was liable for the damages thus suffered by the plaintiff which were fixed by the judge at $400.

Wilson, and *Davis,* for plaintiff. *Haggart, K.C.,* and *Howden,* for defendant.

Mathers, J.] EMERSON v. WRIGHT. [Sept. 14.

Costs—Charges of fraud not proved—Apportionment of costs when some issues proved.

Re-argument by consent of the question of the costs of the action. See note of this case, *ante* p. 378.

MATHERS, J.:—Further argument has convinced me that in depriving the plaintiffs of all costs I did them an injustice. The statement of claim does contain a number of damaging allegations which the plaintiffs made no attempt to prove and which I am satisfied were unfounded, but they did succeed in establishing some of the issues raised. It would be unfair to make the defendant pay all the costs, and at the same time it would be unfair to deprive the plaintiffs of the costs of the issues on which they succeeded. *Pocock* v. *Reddington*, 5 Ves. 800, is an authority for apportioning the costs under such circumstances. In my opinion justice will be done by allowing the plaintiffs one-half the costs of suit up to and including the trial, and I therefore vary my former judgment accordingly.

Minty, for plaintiffs. *Laird*, for defendant.

Mathers, J.] WINTHROP *v.* ROBERTS. [Sept. 14.

Mortgagor and mortgagee—Redemption—Deed absolute in form but intended as security only—Acknowledgment obtained from mortgagor by duress.

The plaintiff, having squatted on the land in question which belonged to a railway company, applied in 1899 to purchase it, and the company agreed to sell it to him at $3.00 per acre, allowing him to remain in possession. Being indebted to the defendant under a chattel mortgage which the latter was about to foreclose, and having made no payment on the land, the plaintiff, in 1901, gave him a quit claim deed of the land as a security for the debt. Subsequently, the defendant filed the quit claim deed with the company and made payments to it from time to time until Feb. 4, 1903, when he paid the company in full. Prior to this last payment, the plaintiff, at the instigation of the defendant, applied to a mortgage company for a loan of $1,000 for the purpose of paying off the defendant and the loan was accepted at $900. The defendant claimed that the amount due to him was $930, and the plaintiff paid the odd

$30 and the costs of the loan in cash to the solicitor who was acting for defendant. The plaintiff then gave the defendant an order on the loan company for the whole proceeds of the loan, and when paid the land was to be conveyed by the defendant to the plaintiff's wife. The loan was delayed several months waiting for the patent from the Crown, and when it did arrive the defendant demanded a further sum to cover interest on his claim in the meantime. The additional sum was not paid and a short time afterwards the defendant notified the plaintiff that if he wanted the farm he would now have to pay $2,000 for it. In November, 1903, the plaintiff went to the defendant's office and received from him a letter written by the defendant, addressed to the plaintiff's wife, offering to sell the farm to her upon certain conditions for $2,000, and the defendant, at the same time, procured the plaintiff to sign a letter agreeing to leave the place and all his improvements if the option to purchase was not exercised before the first day of November, 1904. When this last letter was signed, the plaintiff was told by the defendant that he must do so or leave the place.

Held, that this transaction was, on its face, most unfair, and extortionate and having been obtained by duress, could not be allowed to stand in the way of the plaintiff's right to redeem, which, before it was entered into, was clear upon the evidence that the quit claim deed he had given was only intended as a security.

Ford v. *Olden*, L.R. 3 Eq. at p. 463, followed.

Judgment for redemption with costs as defendant had disputed the right to redeem.

Haggart, K.C., for plaintiff. *Wilson* and *Haffner*, for defendant.

Province of British Columbia.

SUPREME COURT.

Morrison, J.] [Aug. 1.

CHINESE EMPIRE REFORM ASSOCIATION *v.* CHINESE DAILY NEWSPAPER PUBLISHING CO.

Company—Non-trading corporation created under the Benevolent Societies Act, R.S.B.C., 1897, *c.* 13—*Libel of.*

A non-trading corporation, having the right to acquire pro-

perty which may be the source of income or revenue, the transaction of the business incidental thereto creates a reputation, rights and interests similar to those of an individual or a trading corporation, and must have the same protection and immunities, and be given the same remedies, in case of injury as a trading corporation.

Davis, K.C., for plaintiffs. *Sir C. H. Tupper*, K.C., and *Boak*, for defendants.

Full Court.] [Aug. 1.

NORTHERN COUNTIES INVESTMENT TRUST *v.* CANADIAN PACIFIC RY. CO.

Railways—General and special legislation—Dominion and Provincial—Damages caused by sparks from engine—Negligence—Limitation of action—"By reason of the railway."

In an action for damages caused by sparks from a railway engine, the railway company claimed the benefit of s. 27 of Con. Railway Act, 1879, which was incorporated into their charter by Parliament. Sec. 27 provides in part that all suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months next after the time of such supposed damage sustained.

Held, on appeal (IRVING, J., dissentiente) that by virtue of section 20 of the Interpretation Act (Dominion) the Railway Act, 1903, governs the Canadian Pacific Railway Company.

Martin, K.C., for appellant (plaintiff company). *Davis*, K.C., and *McMullen*, for respondent (defendant railway company).

Clement, J.] REYNOLDS *v.* MCPHAIL. [Sept. 21.

Practice—Stay of execution pending appeal to Full Court—Security for costs.

On a motion for a stay of execution pending an appeal to the Full Court on giving security for the amount of the judgment debt,

Held, that under order 58, rule 16 of the Supreme Court Rules, 1906, the granting of a stay of execution pending an appeal is a matter of discretion to be exercised upon the facts of each particular case.

A. D. Taylor, for the motion. *J. A. Russell*, contra.

Book Reviews.

The Law relating to Covenants in Restraint of Trade, Second Edition, by J. B. Mathews, and H. M. Adler, M.A., LL.M., Barristers-at-law. London: Sweet & Maxwell, Limited, 3 Chancery Lane, 1907.

This book contains a consideration of all the cases worth referring to in connection with the above subject since the *Maxim-Nordenfeldt case*, decided in 1894, which somewhat crystalized the nebulous and uncertain law relating to restraint of trade. The last case noted is the very recent one of *Dottridge Brothers* v. *Crook*, reported in the *Times* of June 22, 1907. After discussing the subject under various appropriate headings the author gives, by way of a digest, a collection of all the cases decided from the date of *Mitchell* v. *Reynolds*, 1 P. Wms. 181, 1 Sm. L.C. 11th ed., 406, to the present time, with occasional notes. Both editors and publishers have done excellent work in this volume.

The Principles of Mercantile Law, by JOSHUA SLATER, of Gray's Inn, Barrister-at-law. Third Edition, London: Stevens & Haynes, 13 Bell Yard, Temple Bar, 1907.

A useful summary of the leading features of mercantile law prepared for the use of beginners and for those of the general public who desire elementary information on this vast subject. Some of the latter may possibly learn enough from this book to think that they are competent to do their own business. A probable want of success in that endeavour will bring grist to the legal mill. However, Mr. Slater has done his best within the compass of 292 pages, at the cost of 6s. 6d.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Hon. Auguste Tessier, of Quebec, to be puisne judge of the Supreme Court of the Province of Quebec in the room of Mr. Justice Larue, retired. (Oct. 11, 1907.)

Frederick W. Howay, of New Westminster, B.C., barrister-at-law, to be judge of the County Court of New Westminster, in the room of his Hon. W. N. Bole, resigned. (Oct. 14, 1907.)

Canada Law Journal.

VOL. XLIII. NOVEMBER 15. NO. 22.

RIGHTS OF PARENTS TO THE CUSTODY OF MINOR CHILDREN.

Exception must be taken to the dictum of Judge Reynolds of the Circuit Court of the City of St. Louis, Missouri, to the effect that, other things being equal, a mother has just as much right as a father to the custody of a minor child. The mother claimed from the father the custody of their child, who was of what the law calls "tender years." The wife had left her husband without cause, and had taken the child with her.

Every lawyer is aware that by the common law the father has, subject to some well understood exceptions, a paramount right to the custody of his child, and this right has always been recognized and none of the statutory enactments for the benefit of married women have affected the principle that the father, as against the mother and the whole world, has the primary right to the care, control and education of his own offspring.

It is only where by improper or profligate habits a father has rendered himself unfit to have the custody of the child that he can be deprived of such custody. The tendency to weaken the supremacy of the father, which has exhibited itself of late years, however desirable in exceptional cases, is fraught with danger to the stability of the family as an institution. There are, of course, cases where neglected children must be legally protected. The Children's Protection Act of Ontario, 1897, consolidating the law on the subject, contains ample provisions by which Children's Aid Societies may obtain the custody of the children of immoral or vicious parents.

But the view that, on some sentimental ground, a father should be deprived of the custody of his child, is really pernicious inasmuch as it tends to disrupt the family, and ignores the re-

sponsibility of the father for the maintenance, care and education of his offspring. This view is engendered by that spirit of "paternalism" which socialistic theorists would substitute for the stern, but noble, code of individual duty. To relieve a father from the obligation of supporting his child, and to make the latter, as it were, the "ward of the state" is a mistaken policy. Whilst it has been laid down that "the interests of the child" must be the guide to the judge in awarding the custody of the infant, the law rightly assumes that in the vast majority of cases the father will have at heart "the interests of his child." The duty cast upon him of supporting his family must accompany his right to the control and custody of his children. As on him rather than on his wife is cast the obligation to maintain the children, so must he have the primary right to their custody. We must, therefore, entirely dissent from the statement as to the law on this subject in the judgment referred to, and also record a note of warning against anything which may tend unduly to weaken family ties and responsibilities.

A protest against legislation of the tendency above referred to is given in a recent issue of the *Spectator,* and from a source which merits attention as it appears in the letter of a workingman published in that excellent periodical. After exposing the objectionable nature of the socialistic fad of feeding school children he makes some general observations worth recording. "The fact that our children are altogether dependent upon us is an extra incentive to effort and we are as a consequence better workmen and better citizens in every way. If the responsibility attendant upon the maintaining of children were removed slackness in every direction would be the inevitable result. Having had to provide for a family has been many a man's salvation. . . . I wish my children to be my own, not partly mine and partly the state's." He then refers to another socialistic fad, the old age pension and says: "Nothing better fits a man for leading a useful life than a sense of personal responsibility, and if that be removed demoralization quickly follows. . . . If only the working classes could be persuaded to do their own thinking

instead of listening to the clap-trap of irresponsible politicians there would be a change for the better. But so long as men are content to accept a ready-made political creed because it is easier than honestly thinking out one, the loud-mouthed clamour for such measures will continue."

The Chief Justice of the Common Pleas Division of the High Court for Ontario is reported in the public press as having declared in commenting on a certain order that it was useless "except as shewing the absolute rottenness of our judicial system." The reference was doubtless to that part of our judicial system which deals with questions of practice. We scarcely think that the report can correctly state what fell from the learned Chief Justice, for that very able judge would doubtless agree that it is a grave matter for him to cast wholesale contumely on our judicial system. If it is really "rotten" we would respectfully suggest that it would be more to the point for the Chief Justice to make an earnest effort to amend it either by representations to the Attorney-General, if the aid of the Legislature is required; or, as what was under discussion was a question of practice, by getting the judges together and passing some more rules, or replacing the "rotten" ones with sound material. It must be remembered that the judges are responsible for the Rules which regulate matters of practice and have the right at any time, and ought, from time to time, to make any necessary changes, to correct any faults and simplify procedure and so lessen cost of litigation. They have ample powers in the premises.

We most heartily congratulate the Chief Justice of Ontario upon the honour which has recently been conferred upon him. Not only is the position entitled to the distinction, but the profession will be pleased also that it should fall upon Sir Charles Moss, its most courteous and worthy occupant.

ONTARIO BAR ASSOCIATION.

Arrangements have been made by the executive of the Ontario Bar Association for a convention of the legal profession to be held at Osgoode Hall on the 29th inst. at 10 a.m. It is proposed to have a discussion on general matters of law reform; the administration of criminal law; the extension of the jurisdiction of inferior courts, and other matters of interest to the profession, who are invited to send in writing to the secretary No. 9 Toronto St., any views they may have on matters affecting the welfare of the profession.

The objects of the Association are: "To facilitate the administration of justice, to promote reform in the law and in procedure, to uphold the honour and dignity of the profession, to bring about united action by the profession, and to encourage interchange of ideas and social intercourse among the members of the profession in Ontario."

We are glad of this movement, and it is all the more necessary in these days when politicians are endeavouring for selfish or party purposes to make a football of professional matters, attempting to play a game, the rules and scope of which they are profoundly ignorant; and this is none the less hurtful as they appeal to a silly popular prejudice which affects the masses, who, in their turn, sway their representatives in the House of Assembly. It is very necessary in these days that the profession should get together and make felt their intelligent view of things, as well as their influence, which, if unitedly exercised, would be very great and very helpful to the public.

THE AMERICAN BAR ASSOCIATION.

The American Bar Association met in Portland, Maine, in the closing days of last August. That which would most interest our readers in this country was an address by Hon. James Bryce, who was the principal speaker. His subject was, "The

influence of national character and historical environments on the development of the common law." We regret that want of space prevents us giving this most interesting address in full; but it may be found in the *Green Bag* of last month. We quote however, some of the closing words of Mr. Bryce:—

"The life of every nation rests mainly on what may be called its fixed ideas, those ideas which have become axioms in the mind of every citizen. Now it was mainly by the common law that these fixed and fundamental ideas were moulded whereon the constitutional freedom of America, as of England, rests. One hundred and thirty-one years have now passed since the majestic current of the common law became divided into two streams which have ever since flowed in distinct channels. Many statutes have been enacted in England since 1776 and many more enacted here, but the broad character of the common law remains essentially the same and it forms the same mental habits in those who study and practice it. In nothing, perhaps, does the substantial identity of the two branches of the old stock appear so much as in the doctrine and practice of the law. It is a bond of sympathy, not least because it is a source of common pride. The law of a nation is not only an expression of its character, but a main factor in its greatness. What the bony skeleton is to the body, what her steel ribs are to a ship, that to a state is its law, holding all the parts fitly joined together so that each may retain its proper functions. The common law has done this for you and for us in such wise as to have helped form the mind and habits of the individual citizens as well as of the whole nation. It is all their own. They can remould it if they will. Where a system of law has been made by the people and for the people, where it conforms to their sentiments and breathes their spirit, it deserves and receives the confidence of the people. So may it ever be both in America and in England."

BAGGAGE AND PASSENGER ON DIFFERENT TRAINS.

The doctrine that baggage "implies a passenger who intends to go upon a train with his baggage, and receive it upon the arrival of the train at the end of the journey," has had some support from the Courts. It was declared in the case of *Marshall* v. *Pontiac*, O. & N. R. Co. 126 Mich. 45, 55 L.R.A. 650, 85 N.W. 242, where one who had brought a ticket for the sole purpose of checking his baggage, and did so, while he travelled by a private conveyance, was denied any claim against the carrier for the theft of the baggage unless the carrier was guilty of gross negligence, on the ground that the carrier was only a gratuitous bailee. In a note to this case as reported in 55 L.R. A. 650, the authorities touching the question were carefully reviewed, and the conclusion reached that this decision was based on a theory of the relation of baggage to the passenger which does not at all fit the modern practice of railroad transportation in this country, though consistent with the usages of carriers of earlier times. As we in March, 1902, said: "If this theory was ever true, it has certainly ceased to be true, for it is an every-day occurrence that railroad companies, either for their own convenience or for the convenience of a passenger by train, carry his trunk on an earlier or a later train. In fact, their time tables expressly say that certain trains which carry passengers will not take baggage, and that this must go by other trains." The Court in the case referred to said that, if the owner of the ticket had told the baggage master that he was not going on the train, he would have been refused a check for his trunk; but it is not easy to believe that any baggage master or any railroad official would decline to check a trunk on a ticket regularly purchased, merely because he knew that the company would not have to carry its owner also. When passenger transportation was chiefly by stage, and the baggage constantly under the passenger's eye, there might have been some reason in holding that the passenger must accompany his baggage; but in these days of railroads a trunk is beyond the passenger's reach even if he is on the same train. It is out-

side of his custody and beyond his authority. It can make no possible difference to the risk of carrying it, whether he is on the same train or some other train; and, in fact, in many instances he is not allowed to have it on the same train which carries him. This view of the subject is accepted by the recent Minnesota decision in *McKibbin* v. *Wisconsin C. R. Co.*, 100 Minn. 270, 8 L.R.A. (N.S.) 489, 110 N.W. 964. In this case the Court declines to accept the doctrine of the Michigan case above mentioned, and says: "In view of modern methods of checking baggage and the custom of regularly checking it on the presentation of a ticket at stations, general ticket offices, and the homes of passengers, we are of the opinion that there is now no good reason for the rule claimed, if ever there were, and hold that a railway carrier is not, as a matter of law, liable only as a gratuitous bailee of baggage which it has regularly checked, if the passenger does not go on the same train with it." It was therefore held that a salesman who checked his baggage and sent it on a train, intending to follow it on a later train, could hold the carrier liable for its value when it was destroyed by fire while in the carrier's baggage room, through the carrier's negligence.

—*Case and Comment.*

A somewhat peculiar case recently came before the Court of Appeals of the State of New York. The plaintiff had applied for membership in a secret society called the Knights of the Maccabees of the World and in due course came up for initiation. During that ceremony, whilst standing in line with other applicants, he was suddenly seized from behind by the shoulders by a member appointed for that purpose and bent backwards, producing an injury to the spinal column for which he brought action. One can scarcely imagine any society allowing such a case to come into Court; but possibly it was supposed that the Court might follow a previous decision in another State where it was

held that when an applicant for membership in any fraternal organization agrees to be governed by the rules of the Order which provides that the applicant shall submit to its rites, the lodge is not responsible for personal injuries inflicted upon him during the initiation. But in the present case the Court held that the injured man might maintain his action notwithstanding a by-law permitting the childish and barbarous form of initiation prescribed; presumably for the purpose of impressing upon members the importance of the position which the initiation entitled them to. It is a good rule for people to wash their dirty linen at home.

The veracious press has told recently of a party of St. Louis lawyers who are touring England to study its judicial methods and machinery. One of these learned brothers is reported to have announced the result of his researches as follows: "The judges were too advanced in age and were apparently not men of the world. They seemed insufficiently experienced in every-day life and every-day business. They simply sit in judgment and lay down the law just as it was administered hundreds of years ago. A judge elected to the Bench in America is invariably a man of the world, with wide human knowledge, a man of modern life. Altogether, British legal machinery impressed one as insufficiently up to date." The New York *Nation* took the story seriously enough to be inspired to this sarcastic editorial: "It is obvious that these criticisms are well founded. English judges are still under the impression that a prisoner brought up for trial should be either condemned, or acquitted, instead of being allowed to die of the gout in jail while awaiting his fifth trial. The judges across the water are hundreds of years behind in their attitude towards triumphant science, for it is on record that they will actually interrupt an expert in the witness-chair even while he is engaged in making an ass of himself. With an utter lack of worldiness, English judges do not take a leading part in gigantic clambakes, beefsteak dinners, or potato races for fat men. And, worse than all, they are not up even on the rudiments of the Law of the Previous Fist, sometimes known as the unwritten law."—*Green Bag.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

ADMIRALTY—COLLISION—LOSS OF USE OF VESSEL—VESSEL WORKING AT A LOSS—DAMAGES—REMOTENESS.

The Bodlewell (1907) P. 286 was an admiralty action for damages for a collision. The vessel injured was working at a loss for the purpose of establishing a new trade; and the question for determination was what was the proper measure of damages. Deane, J., held that the contingent profit which might be earned when the trade should be established and rates had become remunerative, was too remote to be taken into consideration as special damage, and in such a case where no loss apart from the actual expense of repair can be shewn from the temporary loss of the use of the vessel, general damages are not recoverable from the vessel in fault.

ADMIRALTY—COLLISION—INDEMNITY—THIRD PARTY NOTICE.

The Kate (1907) P. 296 was also an admiralty action to recover damages for a collision. In this case a question arose as to the right to serve a third party notice in the following circumstances. A steamship was brought to a dock by two tugs, but was unable to get close to the quay owing to a barge attached to a buoy being in the way. The dockmaster sent a man from each of the tugs to loosen the barge and directed a third tug to tow the barge away; but in so doing the barge was, owing to the negligence of the men sent to loosen her from the buoy, allowed to come in contact with the propeller of the steamship, whereby she was injured and sank. The action was brought by the barge owners against the dock owners, who admitted liability, but claimed to bring in the steamship owners as third parties liable to indemnify them under a towage contract made between the dock owners and a firm of ship repairers who had undertaken to bring the steamship from their yard to her berth at their own risk. By the towage contract the dock owners were to supply tugs, but the masters and crews were to cease to be under the contract of the dockowners and to be subject to the orders and control of the master or person in charge of the steamship. Deane, J., held that the steamship owners were not liable to indemnify the dock owners, and the Court of Appeal (Lord Alverstone,

C.J., and Moulton and Kennedy, L.JJ.), affirmed his decision on the ground that the vessel having been brought to the dock the towage contract was at an end, and the crews of the tugs had passed back to the service of the dock owners.

PARTNERSHIP—PARTNERSHIP ARTICLES—"PROFESSIONAL MISCONDUCT"—EVIDENCE—ORDER ERASING NAME OF PRACTITIONER —DENTISTS ACT 1878 (41-42 VICT. C. 33) SS. 13, 14, 15.

Hill v. *Clifford* (1907) 2 Ch. 236 was a case involving the same question as was in issue in *Clifford* v. *Timms* (1907) 1 Ch. 420 (noted ante p. 395). Articles of partnership between dentists provided that the partnership might be dissolved in case any of the partners should be guilty of professional misconduct. The plaintiff in *Hill* v. *Clifford* and the defendant in *Clifford* v. *Timms* gave notice of dissolution, and the question to be determined in the action was whether the notice of dissolution had been properly given. At the trial of the actions, as proof of the alleged misconduct, there was tendered in evidence the order of the General Medical Council erasing the name of the Cliffords from the register of dentists for professional misconduct, and it appeared that on the hearing of the matter before the Council the Cliffords' counsel had admitted the alleged unprofessional conduct, and had refrained from offering any evidence. Warrington, J., held this not to be admissible evidence of misconduct, but the Court of Appeal (Cozens-Hardy, M.R., and Barnes, P.P.D., and Buckley, L.J.) held that the evidence tendered was prima facie evidence of the fact of professional misconduct, and being uncontradicted was sufficient, and that, even apart from the order, there was evidence of admissions by the Cliffords sufficient to establish the case. The Master of the Rolls further points out that the fact that the Cliffords had been disqualified from practising as dentists, had ipso facto the effect of making their further continuance as partners unlawful, even though their names did not appear in the style of firm. Buckley, L.J., points out the order was admissible (1) to shew that it had in fact been made, and (2) the grounds on which it had been made, and although not conclusive of the truth of the facts on which it was based, it was some evidence within proper limits as were also the admissions made before the Medical Council, which had been tendered and rejected by Warrington, J.

VENDOR AND PURCHASER—COMMERCIAL COMPANY—POWER TO ACQUIRE LAND—IMPLIED POWER OF SALE.

In re Kingsbury Collieries and Moore (1907) 2 Ch. 259 was an application under the Vendors and Purchasers Act for the purpose of obtaining the opinion of the Court whether the vendors had power to sell. The vendors were a colliery company and they had express power to acquire by purchase or lease coal mines and mineral lands for carrying on their business as colliers and coal merchants. There was no express power in their articles of association to sell any of the real estate thus acquired by them. Kekewich, J., held that a power to sell land it was authorized to acquire, was impliedly given the company by its constitution.

HUSBAND AND WIFE—INTESTACY OF HUSBAND—WIDOW—CONTINGENT INTEREST—INTESTATES' ESTATES ACT 1890 (53-54 VICT. c. 29) ss. 1, 5, 6—(R.S.O. c. 127, s. 12).

In re Heath, Heath v. *Widgeon* (1907) 2 Ch. 270 will be found a useful case in considering the effect of R.S.O. c. 127, s 12, which entitles the widow of a deceased person to the whole of his estate where it does not exceed $1,000. Under the similar English enactment 53-54 Vict. c. 29, a widow is entitled to the estate if it does not exceed £500, and in the present case the husband had died leaving as his sole estate a contingent reversidiary interest which, at the time of his death in 1894, was of no market value. In 1904 it fell into possession and was worth £3,500, and it was held by Kekewich, J., that the value of the husband's estate must be taken at the time of his death, and that the widow was therefore, entitled to the whole fund.

ADMINISTRATION—LEGACIES—GENERAL OR SPECIFIC—ABATEMENT OF LEGACIES—LEGACY IN SATISFACTION OF DEBT—FORGIVENESS OF DEBT.

In re Wedmore, Wedmore v. *Wedmore* (1907) 2 Ch. 277, Kekewich, J., determines two points (1) that a legacy given in satisfaction of a debt, if the legatee chooses to take under the will, must be regarded as a general legacy and liable to abatement in case of an insufficiency of assets to pay all legacies, but (2) that the forgiveness of a debt by a testator is a specific legacy and not subject to abatement in case of insufficiency of assets for paying legacies.

SHIP—SHARES IN SHIP—UNREGISTERED MORTGAGE OF SHARES—CONTRACT TO SELL SHARES TO PART OWNER—NOTICE—PRIORITY—MERCHANT SHIPPING ACT 1894 (57-58 VICT. C. 60) SS. 33, 56, 57.

In *Barclay* v. *Poole* (1907) 2 Ch. 284 the plaintiffs were mortgagees of 26 shares in a ship. The mortgagor was the managing owner, and at his request the mortgage was not registered. Subsequently he contracted to sell 20 of the shares to other part owners without notice of the mortgage, and the contract provided that the purchase money should be applied as far as necessary in discharge of debts owing by the vendor as managing owner to creditors of the ship, and the balance should be paid to the vendor. The vendor gave the purchasers a bill of sale which was duly registered, and the purchasers applied part of the purchase money in discharge of the ship's debts, after they received notice of the plaintiffs' claim. The plaintiffs contended that, having given notice of their claim before the purchase money was paid, they were entitled to have it all paid to them, their mortgage being greater than the whole amount of the purchase money. The purchasers on the other hand contended that the mortgagees were only entitled to the balance which was coming to the vendor after discharging the ship's debts, and Eady, J., so held, being of the opinion that the effect of the Merchant Shipping Act is to vest in the registered owner of shares an absolute right to dispose of them, and to give valid receipts for the purchase money, or to direct the mode of its application. That in this case the purchasers had a pecuniary interest in the purchase money being applied as agreed, and that was, therefore, an essential part of the contract which they had the right to have carried out in its entirety as against the plaintiffs of whose claim they had no notice when they purchased.

RECEIVER—PARTITION—SALE BY MORTGAGEE OUT OF COURT—PURCHASE BY RECEIVER WITHOUT SANCTION.

Nugent v. *Nugent* (1907) 2 Ch. 292 was a partition action. The plaintiffs were owners of an undivided three-fourths of the property and the defendant was entitled to the remaining undivided one-fourth. The defendant was appointed receiver in the action. The property was subject to a mortgage and pending the action the mortgagee obtained the leave of the Court to go

into possession and exercise his power of sale. The receiver was not discharged, nor did the mortgagee go into possession, but he put the property up for sale by auction, and the defendant without obtaining the consent of the plaintiffs or the leave of the Court, attended the sale and became the purchaser. In these circumstances Eady, J., held that the defendant, being receiver, had no right to purchase for her own benefit without first obtaining the sanction of the Court even at a sale out of Court, and that she must be deemed to have bought for the benefit of herself and the plaintiffs, subject to a lien in her favour for the purchase money and interest at four per cent.

WILL—CONSTRUCTION—TENANT FOR LIFE AND REMAINDERMAN—POWER TO POSTPONE CONVERSION—PROPERTY NOT ACTUALLY PRODUCING INCOME—PAYMENT OF INTEREST DEFERRED.

In re Lewis, Davies v. *Harrison* (1907) 2 Ch. 296 was a conflict between tenant for life and remainderman. A testator directed his trustees to sell his residuary real and personal estate and gave the income of his estate to his wife for life, and gave his trustees power to postpone conversion. Part of the residuary estate consisted of a mortgage respecting which the testator had agreed with the mortgagor that payment of the principal and interest should be deferred until the mortgagor's death, the mortgagor covenanting then to pay principal and interest. The testator died in 1901, his widow died in October, 1906. The mortgagor died in January, 1906. The mortgage had never been sold, and it was admitted that it would now be paid in full, and the question which Warrington, J., was asked to decide was, who was entitled to the interest which accrued on the mortgage from the time of the testator's death until the death of the mortgagor? and he held that the widow's representatives were the persons entitled to it.

ADMINISTRATION—REAL ESTATE—PARTITION—FUND IN COURT PROCEEDS OF REALTY—RIGHT OF CREDITORS TO ATTACH FUND BEFORE JUDGMENT.

In re Moon, Holmes v. *Holmes* (1907) 2 Ch. 304 was an administration action brought by creditors of a deceased person and, before judgment had been obtained in the action, the plaintiffs applied for an interim order to restrain the devisees of the deceased from obtaining out of Court in a partition action

brought by them moneys, proceeds of the realty, but Warrington, J., held that notwithstanding the statute making lands assets for the payment of debts, creditors, until judgment, have no lien or charge thereon, and he refused the motion.

TRADE NAME—NAME DESCRIPTIVE OF ARTICLE OR PROCESS—SIMILIARITY OF NAME—INJUNCTION.

British Vacuum Cleaner Co. v. *New Vacuum Cleaner Co.* (1907) 2 Ch. 312 was an action brought to restrain the defendant company from using as part of its name the words "Vacuum Cleaner." The facts were that the plaintiff company had been organized to purchase and operate a patent process for cleaning by means of suction, which was produced by the creation of a vacuum. The defendant company had also been organized to purchase and operate a subsequent invention for cleaning, also by means of a vacuum. There was no question as to the validity of the defendant's patent, or that the cleaning was effected under it by the creation of a vacuum so as to cause suction, but it was contended that the use of the words "vacuum cleaner" by the defendants was calculated to deceive the public, and lead them to mistake the defendant's business for that of the plaintiffs. It appeared that the plaintiffs had organized a number of subsidiary companies to whom they granted licenses to use their patent within certain specified areas, and that these companies included as part of their names the words "vacuum cleaner." Parker, J., in these circumstances, refused the injunction, holding that the words objected to were not mere fancy words, but words properly descriptive of the processes used by both companies, and he considered that the fact that the plaintiffs had themselves organized other companies which used the words as part of their designation militated against the plaintiffs' contention that their use was calculated to mislead the public as alleged.

ESTATE TAIL—DISENTAILING DEED—PROTECTOR OF SETTLEMENT—EXECUTION OF DISENTAILING DEED BY PROTECTOR AFTER DEATH OF TENANT IN TAIL—FINES & RECOVERIES ACT, 1833 3-4 WM. *IV.*, C. 75) SS. 15, 40, 42—(R.S.O. C. 122, SS. 3, 23, 31, 32, 35.)

Whitmore-Searle v. *Whitmore-Searle* (1907) 2 Ch. 332. This action was brought to obtain a declaration that an estate tail

had been effectually barred and converted into a fee simple. The facts were, that the tenant in tail had on 25th October, 1906, executed a disentailing deed. On the 3rd November, 1906, he died intestate, leaving the plaintiff his sole heir and next of kin. The plaintiff was protector of the settlement and as such on the 19th November, 1906, executed the disentailing deed for the purpose of testifying his consent thereto. The question therefore arose whether the consent of the protector could be validly given after the death of the tenant for life; and, secondly, whether the inrolment of the disentailing deed (in Ontario it would be the registration) can take place after the death of the tenant in tail. The second point was not contested and Kekewich, J., considered it to be settled by *In re Piers' Estate*, 14 Ir. Ch. 452, that inrolment after the death of the tenant in tail is valid. On the first point he held that, notwithstanding the statute provides that where the consent of the protector is given by a separate deed, such deed must, under s. 42 (R.S.O. c. 122, s. 31), be executed "either on, or at any time before, the day on which the assurance is made," it is not necessary where the consent is given by the disentailing deed itself that it should be executed before or at the time of its execution by the tenant in tail. The entail was herefore declared to have been validly barred.

PRESUMPTION OF DEATH WITHOUT ISSUE—EVIDENCE.

In re Jackson, Jackson v. *Ward* (1907) 2 Ch. 354. Kekewich, J., held that the presumption of death which arises after an absence of seven years without being heard of, after reasonable inquiry does not also involve any presumption that such person also died without issue, but, on the contrary, that it is a matter to be established by evidence such as would enable a jury to find it as a fact; and he held that evidence of the following kind was sufficient to warrant the inference, viz.: "That the person in question had left England between the years 1860 and 1866 (there was no direct evidence that he was then unmarried); that he had written two letters to a member of his family, one undated, in which he expressed a wish to see his family before he died, and said, "for I feel certain my life is nearly done on earth," and therein he desired his sister to send him the likeness of a lady, and said he was poor and in bad health. In the other letter, dated April, 1866 (and apparently written after the previous letter), he said he was worth £8,000, and also referred to

the lady before mentioned in affectionate terms and expressed a wish that he could marry her. Nothing was heard of him since the year 1871. In 1890 advertisements were issued. No reply thereto was received. This was considered sufficient evidence to warrant the inference that the absentee had died unmarried and without issue.

RAILWAY COMPANY—PURCHASE OF LAND FOR RAILWAY—RESTRICTIVE COVENANT AS TO USER OF LAND BY RAILWAY—ULTRA VIRES—RESALE OF LAND NOT REQUIRED BY RAILWAY.

In re South Eastern Railway Co. and Wiffin (1907) 2 Ch. 366. A railway company had under its statutory powers purchased a parcel of land for the purposes of its railway and covenanted with the vendor that they and their assigns would use the land for a passenger station "and for no other purpose whatever." Part of the land was not required by the company and they contracted to sell it, and the purchaser thereupon required the company to obtain a release of the covenant as to user; but Neville, J., held that the covenant was ultra vires of the company and that they were entitled to sell free from the restrictions contained in it according to the decision of the House of Lords in *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623 (noted ante, vol. 20, p. 4).

COMPANY—DIRECTOR—RESIGNATION OF OFFICE BY DIRECTOR—WITHDRAWAL OF RESIGNATION BEFORE ACCEPTANCE.

Glossop v. *Glossop* (1907) 2 Ch. 370. The articles of association of a limited company provided that a director might resign his office by notice in writing, but that the resignation should not take effect unless the directors should pass a resolution that he had vacated his office within six months from the happening of the event whereby such director had vacated his office. A director wrote to the company resigning his office, but before any resolution was passed by the directors he wrote withdrawing his resignation. The directors subsequently and within the six months passed a resolution declaring that he had vacated his office, and Neville, J., held that it was valid, and that in the absence of any provision in the articles enabling him so to do, it was not competent for the director after tendering his resignation to withdraw it without the consent of the company.

MORTGAGE—PRIORITY—EQUITIES EQUAL—CONVEYANCE CONTAINING RECEIPT FOR MONEY NEVER PAID—EQUITABLE MORTGAGEE WITHOUT NOTICE.

Capell v. *Winter* (1907) 2 Ch. 376 is one of those hard cases which are constantly arising where through the fraud of a third person it becomes a question which of two innocent persons is to suffer loss. Land was by will vested in two trustees upon trust to sell and divide proceeds among testator's four children (including Capell, one of the trustees). Capell and another owed one Melsome £2,000. Capell had become sole surviving trustee and he and Melsome, in fraud of the other beneficiaries under the will arranged that the £2,000 should be secured on part of the trust estate, and in order to carry out the scheme Capell executed a deed to Melsome purporting to convey the part of the trust estate in question to Melsome in consideration of £2,000, the receipt of which was duly acknowledged in the deed, but no money was in fact paid. Melsome then took this deed to the defendant and deposited it with him by way of equitable mortgage to secure £1,000 advanced and the defendant made the advance bonâ fide and without notice of the fraud or breach of trust or of the fact that the alleged consideration for the deed had not in fact been paid. Parker, J., on this state of facts held that the deed to Melsome did not amount to a contract of sale and therefore there was no vendor's lien for purchase money, but that the beneficiaries under the will had an equity under the will to have the property sold and the proceeds divided and that they were not in any way estopped by the receipt from saying that the money had not been paid, and as the defendant had only an equitable title, and, the equities of the beneficiaries and the defendant being equal, the beneficiaries, as being prior in point of time, were entitled to prevail.

PARTIES—ATTORNEY-GENERAL—INJURY TO LIMITED SECTION OF PUBLIC—RELATOR—ACTION BROUGHT BY WRONG PARTIES—COSTS—AMENDMENT.

Attorney-General v. *Garner* (1907) 2 K.B. 480 is a useful case on the subject of parties. On the facts as found by the judge it appeared that under an award the grass and herbage growing in a private road was to be let yearly by the surveyor of highways or such other persons as the parishioners in vestry assembled should appoint, and the rental was to be applied in

the repair of roads within the parish—and in the opinion of Channell, J., this had the effect of vesting in the parish council the property in the grass and herbage. The defendants had caused damage by wrongfully permitting cattle to graze on the road. The action was brought by the Attorney-General on the relation of the District Council, and also by the District Council, for an injunction and damages. The defendants took issue on the wrongful user of the road, and the greater part of the costs at the trial were occasioned by that issue which was found against the defendants, and a verdict for £5 damages was given by the jury; the case was adjourned at the trial for further consideration, and upon argument of the case on the question of parties, Channell, J., found that the action was not maintainable by the District Council because the property in the herbage was in the Parish Council, neither could the Attorney-General either alone, or upon the relation of the District Council, maintain the action, because the injury complained of was not an injury to any right of the public at large, but merely to a limited section of the public, namely, the parishioners. He therefore dismissed the action, but as the greater part of the costs of the trial had been occasioned by the issue on which the defendants had failed, he refused to give the defendants costs, except the costs of the argument on further consideration, and as no application had been made to amend by adding the proper parties at the trial, he refused to direct an amendment.

MAINTENANCE OF ACTION—COSTS—COMMON RELIGIOUS INTEREST IN SUBJECT OF ACTION.

In *Holden* v. *Thompson* (1907) 2 K.B. 489 the plaintiff, a firm of solicitors, sued the defendants, who were nine members of a committee known as the Kensit Crusade Committee, to recover costs incurred in the following circumstances. Two persons named Davis and Wright had child relatives in an institution known as "All Saints' Home." They disapproved of the religious instruction given in the Home and removed the children. The authorities of the Home took legal proceedings to recover the custody of the children. Davis and Wright applied to the plaintiffs to act in these proceedings, which they did for a month. At the end of that time the matter was brought before the defendants' committee, and they being in sympathy with the religious views of the relatives of the child-

ren who were poor, resolved that the plaintiffs should continue to act on their behalf and so instructed them. The action was brought to recover the costs thus incurred. The defendants contended that the agreement was invalid and illegal, being within the rule against maintenance, but Phillimore and Bray, JJ., held that the case was within the exception to the rule, and that the aid in question being given out of charity and religious sympathy was not illegal.

LANDLORD AND TENANT—COVENANT NOT TO ASSIGN WITHOUT CONSENT—PAYMENT FOR LEAVE TO ASSIGN—"FINE"—CONVEYANCING ACT 1892 (55-56 VICT. C. 13), S. 3.

Andrew v. *Bridgman* (1907) 2 K.B. 494 seems to have some bearing on a subject recently discussed in these columns, viz., the waiving of the benefit of statutes (see ante p. 513). By the Conveyancing Act 1892, s. 3, it is provided that every covenant in a lease not to assign without consent, "unless the lease contains an expressed provision to the contrary," is to be deemed to be subject to a proviso that no fine or sum of money in the nature of a fine is to be payable in respect of such consent. The lease in question contained "no expressed provision to the contrary," but on the landlord being applied to, to consent to an assignment he refused to do so except on the terms of being paid £45. The plaintiff paid the £45 in order to obtain the consent, and brought the present action to recover the money from the defendant on the ground that it had been illegally demanded and paid under duress. Channell, J., however, held that there was nothing in the Act to prevent the parties making a bargain for the payment of a fine even though it had not been stipulated for in the lease, and the respondent having paid the money voluntarily could not recover it back.

BILL OF EXCHANGE—INDORSEMENT BY WAY OF SECURITY—BILL NOT COMPLETE OR REGULAR ON ITS FACE—RIGHT OF PRIOR INDORSER TO SUE SUBSEQUENT INDORSER.

Glenie v. *Bruce Smith* (1907) 2 K.B. 507 was an action on a bill of exchange which had been made and indorsed in the following circumstances. Glenie the plaintiff agreed to sell some pigs to one Tucker on the defendant Bruce Smith agreeing to guarantee payment of the price. Tucker accepted the

bill of exchange now sued on in blank, and Bruce Smith indorsed it, and in this state it was handed to the plaintiff who thereupon signed it as drawer and made it payable to himself and also indorsed it. In view of the agreement between the parties, Lawrance, J., held that the plaintiff must be presumed to have indorsed the bill without consideration to Smith, who then reindorsed it to the plaintiff who was entitled to recover against the defendant as indorser, and that the defendant could not set up the defence that the plaintiff was a prior indorser, or that, at the time the defendant indorsed the bill it was not complete and regular on its face.

SHERIFF—EXECUTION—AGREEMENT FOR LIEN—PRIORITY.

Byford v. *Russell* (1907) 2 K.B. 522. This was an interpleader issue between an execution creditor and the claimant of a lien on the goods seized. The execution debtor was a builder who had entered into a contract with the claimant to erect a building, and whereby it was provided that if the builder failed to proceed with the contract with reasonable despatch after notice in writing from the claimant, that he should not be at liberty to remove from the premises any plant belonging to him placed there for the purpose of the works, and that the claimant should have a lien thereon until the notice was complied with. A judgment was recovered against the builder and execution placed in the sheriff's hands under which he seized the plant. The claimant subsequently, and while the plant was still on the premises, gave notice in writing to the builder, who had not proceeded with due diligence, to proceed with the work, and claimed under the agreement a lien on his plant as against the execution creditor. The County Court judge who tried the issue gave judgment in favour of the execution creditor and the Divisional Court (Phillimore and Bray, JJ.), affirmed his decision, being of the opinion that until the notice was given the claimant had no lien, and by the prior seizure the creditor had obtained priority.

MASTER AND SERVANT—COMMON EMPLOYMENT—INFANT—DANGEROUS EMPLOYMENT—DUTY OF MASTER TO INSTRUCT INFANT AS TO DANGERS OF EMPLOYMENT—DELEGATION OF DUTY—FOREMAN—NEGLECT OF FOREMAN.

Cribb v. *Kynoch* (1907) 2 K.B. 548 was an action based solely on the common law liability of the defendants as employ-

ers, to recover damages for injury sustained by the plaintiff as the defendants' servant. The plaintiff was an infant employed by the defendants in their cartridge factory. The employment was dangerous, and it was the duty of the defendants' foreman to instruct the plaintiff as to the mode of working so as to avoid dangers to be apprehended. The foreman neglected to give the plaintiff proper instructions, and, owing thereto, the plaintiff caused a cartridge to explode, whereby she was injured. In these circumstances judgment was given in the County Court in favour of the plaintiff; but the Divisional Court (Bray and Ridley, JJ.) held that the action was not maintainable, and that although it was the duty of the defendants to give the plaintiff proper instructions, yet such duty might properly be delegated to a foreman, and that the neglect of the foreman to give the necessary instructions is a risk which, under the doctrine of common employment, a fellow servant, even though an infant, takes upon himself. This case has since been approved and followed by the Court of Appeal in *Young* v. *Hoffman Mfg. Co.* (1907), 2 K.B. 646, hereafter to be noted.

COMPENSATION FOR LOSS OF OFFICE—"OFFICE"—"PLACE, SITUATION OR EMPLOYMENT"—SOLICITOR.

In re Carpenter and Bristol (1907) 2 K. B. 617. A statute dissolving the union between certain municipal bodies provided that compensation should be made to officers who thereby should suffer any direct pecuniary loss by reason of loss of office, and the Act provided that the expression "office" includes "any place, situation and employment." A firm of solicitors had been employed for about twenty-six years by the united bodies, receiving the usual professional costs and during that period no other solicitor was employed. They claimed to be entitled to compensation, but on a case stated by an arbitrator the Court of Appeal (Williams, Moulton and Buckley, L.JJ.), held that the solicitors were not "officers" within the meaning of the Act, though they might have been, had they been employed at a salary.

PRACTICE — DISCOVERY — LIBEL — FAIR COMMENT — EXPRESS MALICE.

Lever v. *Associated Newspapers* (1907) 2 K.B. 626 was an action for libel. The defendant pleaded a defence of justification

and fair comment, and on the examination for discovery they asked the plaintiff: "Do you intend to set up that the defendants in publishing the words complained of, were actuated by express malice towards the plaintiff? If yea, state generally the facts and circumstances on which the plaintiffs rely as shewing express malice," and it was held by Jelf, J., that the question was admissible, but the Court of Appeal (Moulton and Buckley, L.JJ.), held that it was not, as being an inquiry as to the plaintiff's evidence.

HIGHWAY—DITCH ALONGSIDE ROAD—WHETHER DITCH PART OF HIGHWAY—DEDICATION.

In Chorley v. *Nightingale* (1907) 2 K.B. 637 the Court of Appeal (Williams, Moulton and Buckley, L.JJ.), have affirmed the decision of Kennedy and Lawrence, JJ. (1906) 2 K.B. 612 (noted ante, vol. 42, p. 710), to the effect that a ditch running alongside a highway between the road and the fence may be dedicated as part of a highway, though it is no part of the roadway and cannot be used by the public for the purpose of passage: and consequently when such a ditch was filled up and used as a part of the roadway, it was not to be regarded as a widening of the highway.

MASTER AND SERVANT—DANGEROUS MACHINERY—INFANT WORKMAN—DUTY OF EMPLOYER TO INSTRUCT WORKMAN—DELEGATION OF DUTY TO FOREMAN—NEGLIGENCE OF FOREMAN—COMMON EMPLOYMENT.

In *Young* v. *Hoffman Mfg. Co.* (1907) 2 K.B. 646 the Court of Appeal (Cozens-Hardy, M.R., Barnes, P.P.D., and Kennedy, L.J.) have approved and followed the case of *Cribb* v. *Lynoch* (1907) 2 K.B. 548 (noted ante, p. 732). The action was at common law and the plaintiff an infant claimed damages for an injury sustained while in the defendant's employment, on the ground of the alleged negligence of the defendant in not properly instructing him in the use of the machine which caused the injury. It appeared that the defendant had employed a competent foreman whose duty it was to have instructed the plaintiff, but that he was guilty of negligence in so doing: but the Court held that the defendant was not responsible for that neglect and that the doctrine of common employment applied; and with regard to the infancy of the plaintiff, the Court held that that fact made no difference.

Correspondence.

THE SOVEREIGNTY OF PARLIAMENT.

TO THE EDITOR, CANADA LAW JOURNAL,

SIR:—

The Law Times, of London, England, in a recent issue says that Lord Lindley has done an important public service in directing attention in the *Times* newspaper to the great fundamental principle of the sovereignty of Parliament, and to the fact that there can be no conflict between the law of the Church and canon law on the one hand, and the common law and statute law on the other. I do not wish to underrate this service, and I agree that so far as the laws of the Church are made by merely ecclesiastical courts they cannot be allowed to prevail if they are contrary to the law of the land. But it may be well to remember that there are some laws of the Church which it does not profess to have made, but to have received by Divine revelation in Holy Scriptures, and these laws cannot be altered or annulled by Parliament *in foro conscientiæ*; Parliament may refuse to impose any punishment for their disobedience, but they still remain the law of the Church, which it is its duty to uphold. For instance we may take the decalogue. The Church did not make these laws, yet it is its duty to uphold them and persuade people to obey them, even though no temporal punishment is imposed for disobedience. At one time the laws of England imposed the most severe punishment for adultery, but such laws are no longer in force. But it is none the less the duty of the Church to uphold and to persuade people to observe the seventh commandment. The Christian Church holds that the law of marriage is regulated by Holy Scriptures, and the law therein laid down has, by Parliament itself, been declared to be "God's law." Parliament has seen fit to abolish all temporal punishments or disabilities for breach of one of its provisions, but because it has seen fit to do so, I fail to see that it has imposed on the Church any obligation or duty to recognize such breaches of "God's law" as being lawful, from a Christian standpoint. As the repeal of penal statutes against adultery has not made that act lawful, so cannot the repeal of penal laws against the marriage with a deceased wife's sister make such unions lawful for those who believe that they are contrary to the law of God.

CHURCHMAN.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Mabee, J.] RE DRINKWATER & KERR. [Sept. 24.

Mortgage—Costs of sale—Taxation—Proper taxing officer—Local master—Local registrar—County judge.

A local registrar is not one of "the taxing officers of the Supreme Court of Judicature" mentioned in R.S.O. 1897, c. 121, s. 30, and therefore has no jurisdiction to tax mortgagees' costs under that section.

Quære, as to the authority of a county judge to make an order for such taxation under R.S.O. 1897, c. 174, s. 36.

A. C. McMaster, for the appeal. *F. M. Field*, contra.

Mabee, J.] [Sept. 25.

DOMINION EXPRESS CO *v.* TOWN OF NIAGARA.

Assessment—"Business assessment"—Land occupied mainly for the business of the party assessed—4 Edw. VII. c. 23, s. 10(O.).

The plaintiffs, an express company, agreed with a navigation company which carried passengers, mails and all kinds of freight and had wharf accommodation, that the agent of the latter should act as agent of the former during the summer months and paid part of the salary of the agent and his clerk and used the wharf and premises of the latter which were assessed to the navigation company.

Held, 1. The land was not used by the express company "mainly for the purpose of their business" and that they were not liable to be assessed for a "business assessment" under the provision of 4 Edw. VII. c. 23, s. 10(O.).

2. The question whether the amount of the assessment was excessive could not be raised in this action, but was for the Court of Revision.

Shirley Denison, for plaintiffs. *A. C. Kingstone*, for defendant.

Divisional Court, Ch.D.] [Oct. 10.

SIMPSON v. T. EATON CO.

Easement—Light—Obstruction to access of light to windows—Claim under grant—Distinction between grant and ancient lights — Injunction — Waiver — Damages — Reference to Master.

The rules settled by the Courts in case of the interference with ancient lights are not applicable to a case where the plaintiffs rights are dependent upon a conveyance from the common owner of the plaintiffs lot and the adjoining one, now owned by the defendant, in which case the plaintiff's windows are to receive such access of light as they had at the time the severance of the plaintiff's lot from that now owned by the defendants.

Held, however, MABEE, J., dissenting, that the plaintiff had by his inertness in insisting on his rights, while the defendants' building complained of was in course of construction, disentitled him to a mandatory injunction for the removal thereof, his remedy being limited to an award of damages, with a reference to the Master therefore, if a sum of $300 assessed by the trial Judge were not accepted as sufficient.

Held, also, that the existence at the time the grant to the plaintiff's predecessor in title of an outstanding mortgage, but which was subsequently discharged, was not material.

Marsh, K.C., and *K. F. MacKenzie*, for appellants. *Shepley*, K.C., for defendants.

Divisional Court, Ch.D.] [Oct. 11.

DEACON v. KENT MANURE SPREADING CO.

Winding-up order—Appeal to Court of Appeal—Jurisdiction of High Court.

Where a winding-up order under the Ontario Winding-up Act is made in violation of the provisions of the statute, or is obtained by fraud or misrepresentation, or is otherwise open to attack, any shareholder prejudicially affected may obtain redress, either by direct application to the County Court Judge, if the order has bee nmade by him, ex parte, or, if made by

him after notice, then by way of appeal to the Court of Appeal. There is no jurisdiction in the High Court to intervene in the matter.

Watson, K.C., for plaintiff. *W. H. Blake*, K.C., and *H. E. Rose*, for defendants.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Oct. 15.

FALLIS *v.* WILSON.

Fraudulent conveyance—Marriage settlement—Action to set aside letter accepting proposal of marriage on condition of property being settled—Bonâ fides—Suspicious circumstances.

On the 31st October, 1906, the plaintiff obtained a verdict for $1,000 damages against the defendant G. H. W. in an action for breach of promise of marriage; there was an appeal, which was dismissed by consent on the 25th January, 1907; judgment was entered for the plaintiff on the 26th January, and execution placed in the sheriff's hands on the 6th February.

Early in October, 1906, G. H. W. had proposed marriage to Miss C.; she took time to consider, and on the 16th January, 1907 (never having seen him in the meantime), wrote him a letter in which she alluded to the "trouble" he was in (meaning the action), and accepted his proposal on condition that he should settle upon her and her children (if any) $2,500 in money or property. On the 28th January he instructed a solicitor to prepare a marriage settlement, which he did, and this was executed at the solicitor's office, where G. H. W., Miss C., and the trustees named in the instrument, his brother and sister-in-law (whom Miss C. had never seen before and whose home was in a distant province) met, on the following day. The property of G. H. W. included in the settlement was $1,000 in money and an equity in land of the value of $800, being practically the whole of his property. The marriage took place on the same day. In an action against G. H. W., his wife, and the trustees, to declare the settlement fraudulent and void,

Held, that there were circumstances of grave suspicion surrounding the transaction; if the letter were part of a scheme, the fact that G. H. W. was in difficulty, and that the action was pending against him, and that the effect of making the trans-

fer of the property would be to prevent recovery by the plaintiff upon her judgment, would make the transaction void under the Statute of Elizabeth; but, the trial judge having found that there was an honest offer of marriage, that the letter was genuine, and the wife (then Miss C.) honest in her statement of the condition upon which she would accept the offer, the plaintiff could not succeed. *Bulmer* v. *Hunter*, L.R. 8 Eq. 46, distinguished.

Judgment of MABEE, J., affirmed.

B. N. Davis, for plaintiff. *Holman*, K.C., for defendant, A. E. Wilson.

Meredith, C.J.C.P., MacMahon, J., Teetzel, J.] [Oct. 18.

RE HALLADAY AND CITY OF OTTAWA.

Municipal corporations—Early closing by-law—Ontario Shops Regulation Act, R.S.O. 1897, *ch.* 257—*Non-compliance with by council—Delegation of duty to clerk.*

The decision of BRITTON, J., 14 O.L.R. 458, quashing a by-law passed by the council of the City of Ottawa providing for the early closing by a class of tradesmen of their shops in the city, was affirmed, upon the ground that the council had failed to comply with the provisions of the Ontario Shops Regulation Act, R.S.O. 1897, ch. 257, having contrary to its requirements, delegated to the clerk the duty of ascertaining whether the petition for the by-law was properly signed.

McVeity, for appellants, the city. *J. R. Code*, for respondent, the applicant.

Master in Chambers.] LEROUX v. SCHNUPP. [Oct. 21.

Evidence—Admitted seduction—Discovery as to promise of marriage—Admissibility.

In an action for seduction, questions as to promise of marriage made by the defendant who admits the seduction are not admissible in an examination for discovery.

D. Henderson, for the motion. *H. M. Mowat*, K.C., contra.

Province of Nova Scotia.

SUPREME COURT.

Russell, J.] SMITH *v.* MCDONALD. [Oct. 25.

Costs—Application to strike out paragraphs of defence—Where properly refused — Counterclaim — Plea in abatement — Action for conversion.

Where an application to strike out paragraphs of the defence was dismissed because the matters were proper to be tried, but the defences subsequently proved unsound,

Held, that plaintiff was not entitled to costs of an application which was properly refused.

Where defendant was considered entitled to recover on his counterclaim for conversion of his sheep and to nominal damages, the issue having been clearly put before the jury and the jury having found that plaintiff dealt with defendant's sheep as his own,

Held, that plaintiff's agreement to deliver the sheep or to pay a fixed sum for them would not be an answer to defendant's claim for conversion until the amount offered by plaintiff was actually paid, and,

Quære, whether it would cancel the conversion even if paid, although defendant could not be allowed the value of his sheep twice.

Held, also, that the pendency of another action in an inferior court would not be ground for a plea in abatement before the Judicature Act and the dismissal of such an action for supposed want of jurisdiction would not prevent the defendant from counterclaiming for the value of the sheep in this action.

Also, that in the taxation of costs no items should be allowed on the counterclaim that were common to both the action and the counterclaim, the whole matter being one issue and no evidence having been given on the counterclaim that was not equally relevant to the defence.

Mellish, K.C., for plaintiff. *W. B. A. Ritchie*, K.C., for defendant.

Drysdale, J.] [Oct. 29.

HACKETT *v.* CHINA MUTUAL INSURANCE CO.

Marine insurance—Prohibited waters—Breach of warranty.

A policy of insurance issued by defendant company on plaintiff's vessel, contained a clause prohibiting the use of certain waters including Cape Breton, between December 1st and May 1st. On the face of the policy the following words were written in: "Permission is granted to use Cape Breton ports until January 1st, 1906."

Held, that these words were merely an extension of the prohibitory clause and that the two clauses read together, ought to be interpreted as a prohibition of the waters named between December 1st and May 1st, and of the Cape Breton waters between January 1st and May 1st, and that so construed, the use of Cape Breton ports after January 1st was a breach of a plain term inserted in the policy and a breach of warranty which avoided the policy before loss.

Lovett, K.C., and *Burchell*, for plaintiff. *MacIlreith*, for defendant.

Drysdale, J.] LAWSON *v.* TOWN OF GLACE BAY. [Oct. 29.

Municipal corporation—Annual appointment—Vacancy—Unexpired term.

Under the provisions of the Liquor License Act, R.S. c. 100, s. 181, the council of every municipality in which the Canada Temperance Act is in force, shall annually appoint one or more inspectors for the purpose of enforcing such Act, and if the council fails to act, such inspector may be appointed by the Governor in Council and any person appointed under the section shall hold office for one year. On March 6th, 1906, the town council appointed M. as inspector for the town, and on Aug. 28th, 1906, M. having resigned they appointed C. in his stead. C. left the country and in November following, the vacancy was filled by the appointment of plaintiff.

Held, 1. The appointment of plaintiff only gave him the unexpired balance of M.'s term, and that without re-appointment his term of office would expire on March 5th, 1907.

2. The appointment being an annual one, the power of the council, except as to the power of removal and the power to fill

vacancies, ceased when they dealt with the office in making the appointment of M. in March, 1906. Even if otherwise the appointments first of C. and then of plaintiff were mere appointments in the place or stead of M.

W. R. Tobin and *Douglas*, for plaintiff. *J. J. Ritchie*, K.C., and *Carroll*, for defendant.

Drysdale, J.] ROSS *v.* COADE. [Oct. 29.

Canada Temperance Act—Illicit purpose—Evidence of knowledge.

Action to recover a balance claimed to be due for two lots of goods (intoxicating liquors) sold and delivered by plaintiff to defendant.

Held, a sufficient defence that the goods were sold and delivered for the purpose of illicit sale and Bridgetown in Annapolis county where the Canada Temperance Act was in force to the knowledge of plaintiff at the time the goods were shipped.

Plaintiff's agent, who took the order for one lot of goods, was informed by defendant of the Act being in force and of defendant's method of doing business.

Held, under the circumstances that the knowledge of the agent must be held to be the knowledge of the principal.

In connection with the sale of a previous lot of goods, it appeared that plaintiff had been doing business with defendant's predecessor in the hotel business at Bridgetown, that the goods shipped were in warehouse at Halifax and that prior to their shipment the warehouseman, in whose custody they were. informed plaintiff that he had written defendant to ask him whether he wished the goods (thirty-seven cases of whisky) shipped to him in barrels in view of Bridgetown being a Scott Act town.

Held, that this was sufficient evidence of plaintiff's knowledge of the illicit purpose, and that plaintiff was a party to an illegal contract in connection with the sale of this as well as the subsequent lot of goods.

H. Ross and *Livingstone*, for plaintiff. *J. J. Ritchie*, K.C., for defendant.

Drysdale, J.] [Oct. 29.

COHEN *v.* SYDNEY LAND & LOAN CO.

Contract relating to land—Fraudulent misrepresentation—Rescission.

Plaintiff was induced to enter into a contract for the purchase of a house and lot of land, the property of the defendant company, by representations made by defendant's agent that the house was situated on defendant's land, and was so situated as to give a driveway between the house and the eastern line of the lot.

After the deed passed and a portion of the purchase money had been paid and a mortgage given for the balance, the lines were run and it was found, not only that there was no driveway as represented, but that a material portion of the house was upon the land of the adjoining owner.

Held, that plaintiff was entitled to a decree rescinding the contract as induced by false representations, and setting aside the deed and mortgage, and restoring the parties to their original position.

Held, further, that if the contract was made under a mutual mistake and misapprehension as to the relative and respective rights of the parties, the agreement would be liable to be set aside as having proceeded on a common mistake.

Gunn, for plaintiff. *Gillies*, K.C., for defendant.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] [Oct. 11.

PATRICK *v.* EMPIRE COAL AND TRAMWAY CO.

Company—Sale of assets—Dissenting shareholder—Injunction.

The holders of the majority of the shares in the capital stock of a company authorized the selling of its property in order to pay its debts, cannot be enjoined from so doing at the instance of a dissentient shareholder.

M. G. Teed, K.C., for plaintiff. *H. A. Powell*, K.C., for defendants.

Barker, J.] RANDOLPH *v.* RANDOLPH. [Oct. 18.

Landlord and tenant—Covenant to leave premises in repair—Lien upon lessee's machinery—Insurance by lessee—Fire—Re-instatement of premises—Application of insurance money—Insolvency—Unliquidated damages—Admission of to proof—Advances upon security of logs—Bank Act—Sale of lumber to be manufactured—Advances by purchaser—Lien on logs.

A lessee covenanted for himself and assigns that buildings of the lessor on the premises at the date of the lease would be left on the premises in as good repair as they then were, also, that machinery of the lessee would not be removed from the premises during the term without the lessor's consent, but the same should be held by the lessor as a lien for the performance of the lessee's covenants and for any damage from their breach. Under a deed of assignment for the benefit of the lessee's creditors, the lease became vested in the trustees. A fire subsequently occurring which destroyed the buildings and machinery, insurance on the latter was paid to the trustees. The lessor demanded of the trustees that the insurance be applied in re-instating the buildings or the machinery. By 14 Geo. III. c. 78, s. 83, insurance companies are authorized and required upon request of a person interested in or entitled unto a house or other building which may be burnt down or damaged by fire to cause the insurance money to be laid out and expended towards rebuilding, re-instating, or repairing such house or buildings.

Held, 1. Without deciding whether the Act was in force in this province, that the lessor was not entitled to the benefit of it, the Act not applying to machinery which belonged to the lessee, and the lessor not having made a request upon the insurance company as provided by the Act.

2. Even had the insurance been upon the buildings, the lessor would have had no equity to it, there being no covenant by the lessee to insure for the former's benefit.

3. The lessor was not entitled to prove for damages against the estate, no breach of the lessee's covenants being possible

until the expiry of the term, but even had breach arisen the claim being for unliquidated damages would not be admissible.

A bank made advances to a lumber operator upon the security of an agreement between him and a trustee that he should sell and deliver a specified quantity of logs to be cut by him, to the trustee, who should, have the property therein as from the stump, and who should, upon delivery, pay for the same by, inter alia, paying the bank amount of its loans.

Held, that the security was void under s. 76 of the Bank Act, c. 29, R.S.C.

By agreement by which E. agreed to sell a specified quantity of lumber to be manufactured by him, to M., it was provided that the latter should have a lien thereon, and upon the logs for the same, for all advances on account made by him. Advances were made under the agreement, when E. assigned for the benefit of his creditors. None of the lumber had then been manufactured, and while E. had in stream or in booms his season's cut of logs, none had been set apart in order to carry out the agreement.

Held, that M. had not a lien upon the logs for his advances.

Barry, K.C., *Earle,* K.C., *Trueman,* K.C., *White,* K.C., and *McCready,* for various parties.

Barker, J.] BROWN *v.* BATHURST ELECTRIC CO. [Oct. 18.

River—Riparian owner—Use of water—Prescriptive title—Mill dam—Interruption of water—Statutory powers—Remedies—Injunction—Ex post facto legislation—Construction.

A riparian owner has a right to have the water flow to his land in its natural channel without material diminution in its volume or sensible change in its quality; and to use it for all ordinary and domestic purposes; he has also a right to the reasonable use of it for commercial or other extraordinary purposes incident to the enjoyment of his property, provided he does not cause material injury or annoyance to other riparian owners.

A prescriptive title to the uninterrupted use of the water of a river will not be obtained by a riparian owner who has

made no use of the water different from that to which he was entitled as a riparian owner.

Defendants, an electric lighting company, owning lands on both sides of a river, and having power by their Act of incorporation to build and maintain dams on the river, erected a dam thereon in connection with their power house. Plaintiff is the owner of a water, grist and carding mill situate lower down on the same river. Defendants ran their machinery at night time, and in the morning it was their practice without having regard to the length of time required for the purpose to store the water until the dam was again full. In consequence the plaintiff was deprived of water and his mills were forced to shut down for a long number of days at a time.

Held, 1. Defendants' use of the water was unreasonable and should be restrained.

2. The statutory power conferred upon the defendants to build the dam for the purposes of their business did not authorize them to make an unreasonable use of the water to the injury of the plaintiff, in the absence of proof, the onus of establishing which was upon the defendants, that their business could not be carried on except with that result.

3. A provision in defendants' Act that they should be liable to pay damages to any owner of property injured by the construction of their dams or works did not apply to damages resulting from an unreasonable use of the water; that the loss sustained by the plaintiff in the enjoyment of his property was continuous and substantial and that under the circumstances he was entitled to relief by injunction.

Defendants were empowered by Act to build a dam upon complying with certain formalities, including the filing of a plan thereof with and obtaining approval of the same by the Governor in Council. A plan was filed with the Governor in Council, but owing to misapprehension its approval was not obtained. The dam having been built, an Act was passed "approving of the dam and providing that the approval should have the same force and effect as if given by Order in Council of the date of the filing of the plan."

Held, that the Act as ex post facto legislation was not to be constructed as legalizing the dam.

Geo. Gilbert and *J. M. Price*, for plaintiff. *M. G. Teed*, K.C., and *N. A. Landry*, for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] LACHAPPELLE *v.* LEMAY. [Oct. 8.

Amendment—Statute of Limitations—New trial—County Court action—Dispute note filed too late—Costs.

County Court appeal. The defendant was personally served with the writ of summons on 31st May. He consulted a solicitor who prepared a dispute note setting up the plea of never indebted and the Statute of Limitations and defendant swore to this on 2nd June.

Having learned from the County Court clerk that it had not been filed, defendant himself prepared another dispute note setting up never indebted only and filed same on the 9th June. The solicitor afterwards sent the first dispute note to the clerk, but it only reached the clerk on 16th June. At the trial, the judge struck out the dispute note last filed and refused to allow an amendment of the other dispute note setting up the Statute of Limitations and entered a verdict for plaintiff for the amount claimed.

Held, that the dispute note filed on 16th June was irregular and was properly struck out, but that an amendment of the other dispute note raising the Statute of Limitations and a new trial should be allowed under the circumstances, upon the defendant paying all costs to date in the Court below, except those of issuing and serving the writ, and the costs of the appeal within ten days after taxation. Otherwise the appeal to be dismissed with costs and the judgment to stand.

Philion, for plaintiff. *Affleck*, for defendant.

KING'S BENCH.

Mathers, J.] LONDON GUARANTEE *v.* CORNISH. [May 13.

Contract—Counter bond of guaranty—Authority of manager for Canada of English insurance company to bind company by indorsement on bond—Consideration.

Plaintiffs had given a bond to the municipal commissioner, dated 1st May, 1904, to insure the faithfulness and honesty of

the defendant Cornish as treasurer of the rural municipality of Brokenhead for a term of three years in the sum of $3,000, and the premium for the three years' insurance was paid in advance. On March 3rd, 1905, the company gave notice, in accordance with a provision in the bond, cancelling the guarantee at the expiration of three months, whereby the liability of the company was confined to any defalcations of Cornish prior to June 3rd, 1905. This action necessitated the vacating by Cornish of his position as treasurer; but, on it being intimated to the council that the company would re-instate Cornish on the bond if they got a satisfactory counter security bond, the other defendants argued to give such security, and the council voted to re-appoint Cornish. The manager of the company for Canada, Mr. Alexander, then had prepared a form of counter security bond for the defendants to sign and, after it was returned to him signed, he sent to the municipal commissioner a document signed by himself purporting to be an indorsement on the original bond re-instating Cornish for a guarantee of $3,000 dating from June 3rd, 1905, to May 1st, 1907. The defendants were not asked to secure the company by their counter bond against past defalcations and did not know that there were any such, and the wording of their counter bond did not clearly shew that it was intended to secure the company against past defalcations of Cornish. Shortly afterwards the company was obliged to pay the amount of its original bond to the municipal commissioner in respect of defalcations of Cornish committed prior to 3rd June, 1905. They then sued defendants upon the counter bond.

Held, that, under all the circumstances, defendants were not liable, as their bond should be held to have relation only to the liability of the company under its re-instating contract, and not to that under the cancelled bond.

Held, also, that, as there was no evidence that Mr. Alexander had authority from the company to make the indorsement he gave, the plaintiffs had failed to establish that they had continued the guarantee bond previously in existence, and consequently there was a total failure of consideration for the defendants' counter bond, and for that reason also they were not liable upon it.

Campbell, A.-G., K.C., for plaintiffs. *Ferguson, Machray, Fullerton and Manahan*, for defendants.

Mathers, J.] MAWHINNEY *v.* PORTEOUS. [Sept. 25.

Breach of warranty—Damages—Measure of damages—Evidence to prove liability for commission.

Action to recover the price of a threshing outfit consisting of a new separator and a second-hand engine sold to the defendant. The engine had been warranted to be in first-class repair and in good running order. The trial judge found as a fact that it was not in first-class repair when delivered to the defendant, but that he nevertheless accepted it. The chief question to be decided, therefore, was the amount of damages to be allowed for the breach of warranty. The defendant discovered nearly all of the defects complained of before he started using the machine and the others almost at once after starting; but, instead of proceeding at once to have the missing parts supplied, he continued to operate the machine in its defective condition without complaining to the plaintiff of anything but the friction.

Held, following *Crompton* v. *Haffner*, 5 O.L.R. 554, that there could be no recovery for damage which might have been prevented by reasonable efforts on the defendant's part. The defendant was bound, as soon as he discovered the defects complained of, to take the necessary steps to remedy them and cannot recover anything for damages beyond what he would have sustained had he pursued that course. The measure of the defendant's damage is the amount that it would have cost to put the engine in the condition it was warranted to be in plus his loss of profits or from delays during the time that would necessarily elapse before these repairs could be made had he acted promptly after discovering them. Upon these principles, defendant was allowed $30.00 for cost of necessary repairs and $50.00 for loss of profits or from delays during such time.

On defendant's default in payment the plaintiff had repossessed and resold the outfit and sought to deduct from the proceeds of the sale the sum of $250.00 which he said he had had to pay by way of commision on the resale. There was no evidence that the sale had been made through an agent or, if it was, what the proper commission should be.

Held, that the plaintiff had not sufficiently established his right to charge such commission against the defendant and that it should not be allowed to him.

Anderson, for plaintiff. *Hudson* and *Meighen*, for defendant.

Province of British Columbia.

SUPREME COURT.

Clement, J.] [Sept. 27.

IN RE VANCOUVER, VICTORIA AND EASTERN RY. CO.

Practice—Costs of application for warrant for possession—Railway Act, 1903 (*Dom.*) *ss.* 193, 217, 219, *sub-s.* 1.

Where a railway company under its powers to expropriate land, obtains a warrant for possession, and the amount awarded the owner in subsequent arbitration proceedings is less than the amount previously offered by the company, the costs of obtaining the warrant for possession shall be borne by the owner.

Brydone-Jack, for owner. *Reid*, for company.

Full Court.] POWER ET AL. v. JACKSON MINES. [Oct. 31.

Attachment of debts—Moneys due to judgment debtor under mining contract—Attachment by judgment creditors—Mechanics' liens—Liability of garnishees to lien-holders.

On service of garnishee orders under the Attachment of Debts Act, 1904, the garnishees admitted a debt owing to the judgment debtor, but asked the protection of the Court as against mechanics' lien-holders claiming the fund. Thereupon an order was made directing the garnishees to pay the fund into Court to abide the determination of an issue between the attaching creditors and the lien-holders. In this issue the lien-holders failed and proceeded upon their liens against the property.

Held, that the garnishees were not estopped from requiring an issue between themselves and the attaching creditors to ascertain what, if anything, was owing by the garnishees to the judgment debtor at the time of the service of the garnishee orders.

R. M. Macdonald, for appellants. *S. S. Taylor*, K.C., for respondents.

Full Court.] [Oct. 31.

B.C. LAND & INVESTMENT AGENCY *v.* FEATHERSTONE.

Assessment—Flat rate—Authority of Dyking Commissioners to fix—Compliance with statute—Drainage, Dyking and Irrigation Act, R.S.B.C., 1897, *ch.* 64.

In assessing certain lands under the provisions of the Drainage, Dyking and Irrigation Act, the Commissioners fixed upon a flat rate, reaching their conclusion from their personal knowledge of the lands, extending over many years, and without making a personal inspection.

Held, (HUNTER, C.J., dissenting), that the assessment so made was good. Decision of MORRISON, J., affirmed.

L. G. McPhillips, K.C. and *Heisterman,* for appellants, plaintiffs. *J. A. Russell,* for respondents.

Book Reviews.

The Law Quarterly Review, edited by SIR FREDERICK POLLOCK, BART., D.C.L., LL.D. October, 1907. London: Stevens & Sons, Ltd., 119-120 Chancery Lane.

This number contains the editor's interesting notes on recent cases, books and current topics. The articles are: The Privy Council and the Australian Constitution, which discusses the first case in which the Privy Council determined the constitutional relations between the Commonwealth and the States established by the Federal Constitution of 1900. This will be read with much interest in this country. *Young* v. *Grote,* a discussion of the rights and liabilities of bankers and their customers; Administration of justice in Egypt; Le jury a Rome et en Angleterre; Contractual obligations attaching to land; The barristers' roll; The trial of peers; The legal profession in the fourteenth and fifteenth centuries. It is a very interesting number and completes vol. 23.

Shavings, a semi-legal medley, Part I., by J. J. GODFREY, of Osgoode Hall, Barrister-at-law, and of the Bar of British Columbia. Toronto: Arthur Poole & Co. Price $1.00.

Part II. of this brochure will never appear, as the author died suddenly in his office, a short time ago; and Part I. is be-

ing sold in the interest of his widow. It contains some excellent hits at some of the eccentricities and inconsistencies of judicial decisions, etc. We trust it will have a large sale.

Bench and Bar.

Judicial Appointments.

Hon. Charles James Townshend, a puisne judge of the Supreme Court of Nova Scotia, to be Chief Justice of that Court in the room of the Hon. R. L. Weatherbe, resigned.

Frederick Andrew Laurence, of Truro, N.S., K.C., to be a puisne judge of the Supreme Court of Nova Scotia in the room of the Hon. C. J. Townshend. (November 2.)

Election of Benchers.

The following is the result of the election of Benchers of the Law Society of the Province of Alberta: James Muir, K.C., Calgary, 90; C. F. P. Conybeare, K.C., Lethbridge, 79; W. L. Walsh, K.C., Calgary, 72; J. C. F. Bown, Edmonton, 64; D. G. White, Medicine Hat, 58; Hon. J. A. Lougheed, K.C., Calgary, 55; H. C. Taylor, Edmonton, 51; G. W. Greene, Red Deer, 40; O. M. Biggar, Edmonton, 39.

Flotsam and Jetsam.

One night recently, one Joseph Mirandau was walking down a street in the east end of Montreal when he came across a drunken man attempting to drag across the street a girl who screamed and resisted him. Mirandau promptly came to her rescue and therein found it necesary to handle the ruffian with some vigour. The latter the next day summoned him before the Recorder's Court. Mr. Dupuis, the recorder, approved of the prisoner's action, but sentenced him to $1.00 and costs, remarking, "The law is here and I must not ignore it." He certainly should not have ignored it. It was not an occasion on which he should have done so. If he had known a little law he would not have done so.

Canada Law Journal.

VOL. XLIII. DECEMBER 1. NO. 23.

CERTAIN POINTS IN CONNECTION WITH THE DEVOLUTION OF ESTATES ACT.

I. Introductory.

II. Of the shifting of the legal estate from the personal representative to the beneficiaries.

III. Of the registration of belated cautions and the re-shifting of the legal estate from the beneficiaries to the personal representative.

1. Defective language of the Act in that connection.

2. Can the procedure relating to belated cautions be properly resorted to where there are no debts?

IV. Dower in "re-shifted land."

V. Summary.

I. Introductory.

Probably not even its warmest friends, and they are undoubtedly many—and deservedly so—will venture to contend that the Devolution of Estates Act is an enactment devoid of defects.

Possibly no statute on our books is more far-reaching in its effects, or more radical in the changes it has wrought, and consequently of more general interest to the profession and the public at large, and if that is the case, it will be generally conceded that it is a matter of the utmost importance that all its provisions should be as perfect and as free from ambiguity of expression as possible.

To the writer it has always seemed that these desirable ends have been sadly missed in the framing of the Act and its num-

erous amendments, and our purpose in the present article is to consider a few isolated points in this connection.

II. Of the shifting of the legal estate from the personal representative to the beneficiaries.

The general idea introduced by the Act was, as is well understood, that at a certain period (originally one year from the death of the decedent, subsequently by amendment, three years from the death), the legal estate in realty should, without any act on the part of the personal representative, shift automatically from the latter to the various beneficiaries.

How was that sought to be accomplished? By the following words, viz.: "Real estate of persons dying on or after the 4th day of May, 1891, not disposed of or conveyed by the executors or administrators within twelve months after the death of the testator or intestate shall, subject to the Land Titles Act, in the case of land registered under that Act, at the expiration of the said period, whether probate of the will of the testator or letters of administration to the estate of the intestate has been taken or not, be deemed thenceforward to be vested in the devisees or heirs beneficially entitled thereto, as such devisees or heirs (or their assigns, as the case may be), without any conveyance by the executors or administrators, unless such executors or administrators, if any, have caused to be registered, in the Registry Office, or Land Titles Office, where the land is under the Land Titles Act, of the territory in which such real estate is situate, a caution under their hands that it is or may be necessary for them to sell the said real estate, or part thereof, under their powers and in fulfilment of their duties in that behalf; and in case of such caution being so registered, this section shall not apply to the real estate referred to therein for twelve months from the time of such registration, or from the time of the registration of the last of such cautions if more than one are registered."

It is necessary here to bear in mind exactly what the legal estate in land is. It is unquestionably a very definite en-

tity in the eye of the law, and we must not lose sight of the fact that it has always been held to require appropriate words of grant or vesting to convey or transfer it from one person to another.

The equitable estate is quite a different matter and may, as is well understood, be transferred with much less formality; a simple agreement for the sale of land, for instance, having the effect of transferring the equitable estate therein to the vendee; but such vendee can never be invested with the legal estate until a formal conveyance, with appropriate words of grant, has been executed.

Bearing this distinction in mind let us now see how the legislature has set about to transfer the legal estate at the period mentioned. Referring to the Act as above quoted we find that the provision is that, at the period mentioned, the real estate shall be "deemed thenceforward to be vested in the devisees or heirs, etc.

Now with all possible deference for the framers of the Act, one is naturally inclined to ask why the expression "deemed to be vested" is used, and we are driven to enquire what is the exact meaning and effect of those words, and why they were used instead of the more obvious and intelligible expression "shall thereupon vest" or words to that effect.

Surely the intention was that, at the period, and under the conditions mentioned, the land should actually become vested in the parties named.

There must be a distinction between realty being actually vested and being merely deemed to be vested in certain persons. The former is apparently what was intended, but the latter is what has been enacted. We should suppose the accurate meaning of the latter form of expression to be that the land was not to become actually vested in the persons named, but that certain legal consequences should ensue as though it were vested in such persons. Just as though the legislature should enact that such and such a person should be deemed to be dead. The person

would not really be dead, but all legal consequences would ensue, such as devolution of his estate upon his heirs or next of kin, as though he were dead. But if that is the correct interpretation of the words of the Act, matters are left in an unfortunate state of confusion, inasmuch as the legal estate, even though only a bare legal estate, would still remain in the personal representative after the expiry of the prescribed period of shifting, and so, for instance, in every such case a purchaser would be entitled to call for a conveyance from the personal representative as well as from the beneficiaries, and his title would never be perfect until he had received it.

One readily calls to mind the stereotyped words of a vesting order of the Court, viz.: It is ordered that such and such lands "be and the same are hereby vested in so and so, his heirs and assigns for all the estate, right, title and interest" of the parties therein and thereto. There is no ambiguity about that form of expression. The Court does not say the lands shall be deemed to be vested. It actually vests them. The legislature has the same power as the Courts. Vesting enactments are quite common, and they almost invariably use the same form of words as the Courts. It is difficult, therefore, to understand why the peculiar and ambiguous form of expression under discussion was adopted in this Act, or to what it owes its origin.

It is curious and worthy of remark that the Act now under discussion is not the only instance of the use in our statutes of this peculiar form of expression. We find it occurring in other Acts. See, for example, the Loan Corporations Act, R.S.O. 1897, c. 205, s. 49, a section also relating to the vesting of property. The words there are, "In the case of the amalgamation of corporations so assented to, the several corporations parties thereto shall as from the date of the said assent be deemed and taken to be consolidated and amalgamated," etc., and further on in the same section "and . . . all and singular the business, property, real and personal, . . . shall be taken and deemed to be transferred and vested in such new or

such continuing corporation without further act or deed," etc. (a).

It is true that the peculiar form of expression under comment has apparently been universally accepted by the judiciary and the profession as being sufficient to effectuate its professed object, and the matter has always been treated as though an actual vesting of the legal estate in the beneficiaries took place at the period prescribed from the "shifting."

Whether this acceptance is warranted or not seems to be a question not free from very serious doubt.

It would be interesting to have it brought fairly before our Court of Appeal for decision.

Should the decision in such case be that the words were insufficient to effectuate their intended object (and it seems, in the writer's opinion to be extremely likely that it would be so), it is needless to point out the confusion worse confounded that would be thereby introduced into our real estate law.

III. Of the registration of belated cautions and the re-shifting of the legal estate from the beneficiaries to the personal representative.

1. Defective language of the Act in that connection.

By the expression "belated" cautions we mean those registered after the expiry of the period (one year or three years as the case may be) intervening between the death and the period of shifting of the legal estate.

The provision relating to the registration of these belated cautions was not found in the original Act, but was introduced by 56 Vict. c. 20, s. 2, and the effect of such registration was expressed in the following words, viz.: "Such caution shall have the same effect as a caution registered within twelve months

(a) The same ambiguous form of expression is found in sec. 16 of the Devolution of Estates Act, where it is provided that the personal representatives "shall be deemed to have as full power to sell and convey such real estate for the purpose not only of paying debts but also of distributing," etc.

from the death of the testator or intestate, save as regards persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees, or some of them, and save also and subject to any equities on the part of non-consenting heirs and devisees, or persons claiming under them, for improvements made after the expiration of twelve months from the death of the testator or intestate, if their lands are afterwards sold by such executors or administrators."

It will be observed that the provision of this enactment is, shortly, that the registration of a belated caution is to have the same effect as the registration of an ordinary caution. Let us see then what is the effect of this latter registration.

Its definition is found in section 13 of the Act, the provision there being that the legal estate in the realty of a deceased shall shift after one year to the beneficiaries, "'unless such executors or administrators, if any, have caused to be registered in the Registry Office or Land Titles Office where the land is under the Land Titles Act, of the territory in which such real estate is situate, a caution under their hands that it is or may be necessary for them to sell the said real estate or part thereof under their powers and in fulfilment of their duties in that behalf, and in case of such caution being so registered this section shall not apply to the real estate referred to therein for twelve months from the time of such registration, or from the time of the registration of the last of such cautions if more than one are registered."

We learn then that the effect of registration of an ordinary caution is purely negative—that is to say, it does not cause any shifting of the estate to take place from any one person or set of persons to any other person—it merely keeps matters in statu quo for another year (now three years).

The provision of the later enactment, viz: That relating to the registration of belated cautions is that such registration shall have the same effect as the registration of an ordinary caution. How can it possibly have such effect?

In order that the registration of a belated caution may have the same effect as the registration of an original caution the existing conditions must be the same. But here they are entirely different. In the case of the ordinary caution the estate had not yet shifted from the personal representative, and the object of the caution was to prevent it from so shifting. In the case of the belated caution, on the other hand, the estate had already shifted from the personal representatives to the beneficiaries, and what was required was, not some provision that should hold matters in statu quo for a further period, but some provision that should have the effect of taking the estate out of the beneficiaries and revesting it in the personal representative. How can the words of the Act, even by the most strained construction, be held to accomplish that? It is submitted, with all possible deference, that they cannot do so, and that nothing short of appropriate words of revesting in the statute can have that effect. The legislation on the subject has, apparently, entirely missed its mark. It is as though the legislature should purport to enact that a reprieve received by the sheriff after the criminal had been executed, should have the same effect as though received before that interesting event. No doubt, it is sufficiently apparent what the legislature meant to accomplish by the words they have used, but the simple fact remains that they have not done it. The fact that ever since the passing of the Act the words in question have by common consent been treated as effectually accomplishing the desired object, seems to be just one more instance of the good nature and complaisance of the judiciary and the profession towards the legislature.

It was plain what was intended to be done, and the matter has been generally accepted as though it had been effectually accomplished. It has been another case of taking the will for the deed.

We would venture to respectfully suggest that, when amendments are next made to the Act, appropriate words of revesting should be embodied.

2. Can the procedure relating to belated cautions be properly resorted to where there are no debts?

In discussing this branch of the subject it may be well to mention that this belated caution procedure has been quite commonly resorted to where there are no debts. It may be even said to be quite the customary practice to resort to it when occasion arises. It has repeatedly received the sanction of the Official Guardian of infants, and, though we are not aware of any case in which it has been directly approved by the Court, we think it has on many occasions come under the Court's notice without adverse comment.

In that condition of affairs it seems almost presumptuous to raise any question as to the validity of the practice, and yet, with all possible respect, the writer ventures to think there is room for grave doubt whether the procedure was ever intended to be resorted to under the circumstances mentioned, in fact whether it can under such circumstances be validly adopted. The provision of the Act, so far as it is material to the present question, is that where the personal representatives have "through oversight or otherwise" omitted to register the ordinary caution they may register a belated caution, provided they register therewith a further affidavit stating that they find or believe that it is or may be necessary for them to sell the real estate of the testator or intestate under their powers and in fulfilment of their duties in that behalf.

One readily sees why it was important that a provision of this kind should be introduced into the Act. Cases occasionally arose where, after the estate had been allowed to shift into the beneficiaries, it turned out that there were still valid claims against the estate, of which the personal representative had not been aware at the time he allowed the estate to shift. It would be eminently proper in such cases that the personal representative should be placed in a position to deal with such claims by having the estate revested in him and it was to meet emergencies of that kind, it is submitted, that the legislation was introduced. The language used seems to indicate that clearly. It

is where they have through oversight or otherwise omitted to register, etc. In such cases the personal representative can quite properly make the required affidavit, viz., that he finds or believes it is or may be necessary to sell the realty under his powers and in fulfilment of his duties as such personal representative.

But take the case of a personal representative who has satisfied all the debts and performed all his other duties, except the distribution of the estate, prior to the arrival of the period of shifting. Nothing then remained for him to do but to distribute the estate among the beneficiaries. He might do this either in specie by conveying the land in the appropriate shares, or in the form of money after conversion. If the former method were decided on he might, instead of making conveyances, allow the law to vest the realty in the beneficiaries under the shifting process (assuming the shifting provisions of the Act to be efficacious), but surely having adopted either the one course or the other, he is then effectually functus officio. Surely after he had once performed all his fiduciary duties, and distributed the estate, and thus become functus officio, the law never intended that he should ever get the estate back into his hands merely that he might distribute it over again in some different form.

It is submitted that under such circumstances he could not have recourse to the belated caution procedure, for the simple reason, if no other were forthcoming, that he could not properly make the requisite affidavit that he found it might be necessary for him to sell the real estate under his powers and in fulfilment of his duties as personal representative.

Suppose the personal representative to have fully performed his duties by paying the debts of the estate, etc., and thereafter to have executed a conveyance of the realty to the beneficiaries. It would, in that case, be readily admitted on all hands that he was effectually functus officio, and no one would ever dream of attempting thereafter to have recourse to the belated caution procedure. And yet it is obvious that under such circumstances the position attained is precisely that which would have resulted

had the personal representative executed no conveyance, but simply allowed the statute to have its shifting effect. Why then should a locus penitentiæ remain to the personal representative in the latter case any more than in the former?

It seems clear that the belated caution procedure can only have place when it becomes apparent that the personal representative has not fully performed his fiduciary duties, and that therefore in the supposititious cases referred to it is wholly excluded.

It is submitted that it could never have been intended that after the estate had been wound up and the realty distributed, the personal representative, after a lapse of perhaps ten or fifteen years, should get it back into his hands again for the sole purpose of saving a few dollars in the making of title to a purchaser. And yet that is the practice that is in vogue and has been commonly pursued.

IV. Dower in "re-shifted land."

The expression re-shifted land, though no doubt inelegant, is used for convenience to designate land that has shifted to the beneficiaries and afterwards been brought back to the personal representative (assuming, as is largely done throughout in this article, the words of the Act to be in each case efficacious) by registration of a belated caution.

It will be observed that the words of the Act defining the effect of the registration of belated cautions are as follows: Such caution when registered "shall have the same effect as a caution registered within twelve months" (now three years) "from the death of the testator or intestate, save as regards persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees, or some of them; and save also and subject to any equities on the part of non-consenting heirs and devisees, or persons claiming under them for improvements made after the expiration of twelve months from the death of the testator or intestate if their lands are sold by such executors or administrators."

A question arises here which seems, singularly enough, so far as the writer is aware, to have been entirely overlooked in dealing with cases where the title is made under the belated caution procedure. It relates to the position of the wives of the beneficiaries to whom the estate has shifted on expiry of the statutory period. It is well understood that even momentary seisin is sufficient to cause the right of dower to attach. Upon the shifting of the legal estate, therefore, to beneficiaries who happen to be married it seems clear that the inchoate rights to dower, attach at once. But marriage is a valuable consideration and the Act expressly excepts from its re-shifting operation (assuming for the moment that it has any) "persons who in the meantime may have acquired rights for valuable consideration from or through the heirs or devisees or some of them." The wives, therefore, would seem to fall clearly within this saving clause, and their rights to dower inchoate or consummate as the case might be, would remain unaffected by any re-shifting that might take place. Should the personal representatives thereafter sell the realty it would seem that the title of the purchaser would remain in a defective condition until releases were obtained from the wives of the beneficiaries.

The writer has always acted upon that view in his practice, and required releases from the wives under the circumstances in question, but the point does not seem to have met with general recognition, the common practice appearing to be to accept the conveyance of the personal representative without any enquiry as to whether the beneficiaries were married or not.

V. Summary.

If the writer's views as above expressed are correct these main conclusions seem to follow.

1. It is extremely doubtful whether the words of the Act which provide for the shifting of the estate in the realty from the personal representatives to the beneficiaries after the statutory period are sufficient to effect their purpose.

2. It is even more doubtful whether the words of the Act

which purport to effect a revesting of the estate in the personal representatives in the case of the registration of a belated caution are of any efficacy whatever.

3. Assuming that no doubt existed on either of the foregoing questions, Quære, whether title can be made to a purchaser under the provisions relating to the registration of belated cautions where there are no unsatisfied debts.

4. Quære, whether, in case where title is properly made under the provisions relating to the registration of belated cautions (assuming that any such cases exist) it is not necessary to obtain releases of dower from the wives of married beneficiaries before the title can be deemed complete.

It is obvious that if the doubts above expressed as to the efficacy of the words of the Act to accompany its purpose are well grounded, the result is that inextricable confusion has been introduced into a very large number of titles in this province, and that such titles and all future titles similarly dealt with under the Act will remain defective until confirmed either by the execution of appropriate conveyances, or by the operation of the Statute of Limitations.

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THE UNWRITTEN LAW.

In accounting for the rapid increase of crime in the United States, dealt with in our number for Nov. 1, because of its bearing upon our own population, American writers dwell much upon the effect of what they call the "unwritten law," a subject which has been frequently referred to in the public press and which is deserving of more than passing notice. It is as an echo from the times when "the earth was filled with violence," and tells us that human nature is the same in this so-called cultured and civilized twentieth century as it always has been. It means that, as regards certain offences, any man, or any body of men, are justified in making a law for themselves, and carrying it

into effect without any respect for the ordinary tribunals, or the rules and principles by which they are governed, and this is done, not under the spur of sudden provocation, but by premeditated action, and defended as necessary for the protection of society.

In obedience to this barbarous code we find that in the United States a certain class of offenders may be dealt with by those whom they have aggrieved, and the death penalty inflicted, without the aid of judge, jury, or executioner, without any enquiry into the merits of the case, and without any fear of ulterior consequences. Thus rape, adultery, seduction, slander and defamation of character, especially of a woman, may be punished by a shot from a revolver, or stab from a dagger, without the formality of a trial, and with perfect impunity to the person who undertakes the duty of thus giving effect to public opinion. The survivor of a fatal duel must be acquitted if the duel was fairly conducted, and a man who kills another in a fair fight must equally be held blameless. No wonder that where such doctrines prevail Judge Lynch is supreme, and cases of homicide are of frequent occurrence. This doctrine of the unwritten law has also received the sanction of regular judicial authority. In a recent case a judge of the State of Virginia, when a jury had, in a trial for murder, given a verdict of not guilty, thus addressed them: "Gentlemen of the jury, I thank you for a verdict which I think will be approved by the public. It is an established precedent in the State of Virginia that no man tried for defending the sanctity of his home should be found guilty."

Commenting on this case, the *Albany Law Journal* says: "By the written law of Virginia and of every other State it is a crime for any man to take the life of another through private revenge, or for any other cause save in the extremity of defending his own life. When a jury renders a verdict of "not guilty" on a confessed violation of that law, they bring the law and the courts into contempt. They have violated their oaths, and the judge who commends them is a self-confessed anarchist."

Under this code the right of every man, whether white or colored to have a fair trial, is denied. There is no security for life or property, both are alike at the mercy of a mob, or of an individual acting under the influence of some outrage committed, and wrecking vengeance without time being taken, or effort made, to find out the truth. Under such a system, what protection is there for the innocent, what assurance that this rash assumption of judicial authority may not be made a weapon for private revenge, rather than the punishment of crime. As is well said by an American writer: "The flagrant violation and open defiance of law involved in the practice sets all law and authority at naught. It degrades the courts, debases the administration of justice, brings judges, juries and lawyers into contempt, and strikes at the very roots of all social order."

By the same writer the whole case is thus summed up: "One of the most deplorable results of such open and violent infractions of the law is their baleful educational influence. Apart from their evil influence upon the formation of the character of the youth of the country, apart from the fact that men who have participated in such an execution have now stained their hands with human blood, and will be all the more ready to share in other executions of the same kind, these men who have done this and escaped punishment, and even heard themselves applauded for it, are apt to think that, if they have in this case administered justice so much better than the courts, they are able to do equally as well in all other cases, and that the courts of justice are mere useless survivals of an effete and decadent civilization which may as well be abolished or, at least, entirely ignored. Thus the road to anarchy is opened wide with the gaunt, grim figure of the red spectre grinning in the distance."

As said in a previous article we do not refer to the conditions above described for the sake of making any comparison as between them and those prevailing on our side of the border. We refer to them by way of warning lest we ourselves should fall into the same class of error. We are liable to the same influences, and to the same temptations, and it is for those who

may have any power of controlling or directing public opinion to use that power and that influence so that the spirit of law shall not yield to the spirit of lawlessness. Those in authority should make it manifest that by the power of law, as exercised through the regular courts of justice, the right of every man, no matter of what crime accused, to a fair trial is secured—that no crime, no matter how trifling or how serious, shall escape punishment, that by no hasty judgment shall there be any fear of the innocent being confounded with the guilty, and lastly, that the course of justice shall be swift as well as certain, and that no influences, or mere technicalities, shall interfere with or impede the execution of its judgments.

To the legislature we have to look for the enactment of such measures as shall provide for the good government of the country, and the welfare of the people—to the executive for the appointment of good and well qualified men to carry out the laws which may be enacted—to the Bench for the dignity and purity of the courts, and the impartial administration of justice—to the Bar for a high sense of personal honour which will not allow its members to use their great privileges in any way that shall be inconsistent with the responsibilities attaching to those privileges. Their duty is to promote the ends of justice, not to defeat them; to aid in enforcing obedience to the law, and causing it to be looked up to as the best security for life and property; to avoid those theatrical displays so much indulged in elsewhere, and the substitution of a shallow sentimentalism for those deep and enduring principles by which alone the happiness of a people can be secured. Lastly, we must ask the people themselves to have confidence in their own institutions, firm in the belief that even an imperfect administration of law is better than the ill-regulated action of any self-constituted tribunal. Of all laws, mob-law is the worst, and of all Courts, the Court of a mob is most liable to acts of injustice and tyranny.

RUSTICUS.

WHAT BREACHES OF CONTRACT DO NOT GO TO THE ENTIRE CONSIDERATION.

We have recently discussed the breaches of a contract which might be taken as going to the whole consideration and some of the principles which were involved in determining the question. Keeping in mind that no hard and fast rule may be laid down to proceed by, because the nature of contracts differ, so that practical experience has demonstrated that to a greater or less extent each case must stand by itself and be determined by the particular objects to be attained, the nature of the breach and all the surrounding circumstances, we now proceed to the consideration of those breaches which are not sufficient to give rise to the right to regard a contract at an end.

The case of *Mersey Steel & Iron Co.* v. *Naylor*, 9 H.L. App. Cas. 438, is a case where a breach was relied upon for the right to rescind. In that case there was a contract for steel to be paid for in installments. At the time one of the installments fell due the company was forced into liquidation, pending which Naylor was advised not to pay the installment. There was no refusal to pay the amount due or anything said or done by which Naylor evinced an intention not to pay for the remainder of the installments as they fell due. It was held that such a breach did not evince an intention not to be further bound by the terms of the contract and did not go to the whole consideration. In the course of the opinion the Court reviewed the case of *Withers* v. *Reynolds*, 2 B. & Ad. 882, with marked approval. This celebrated case shews very clearly where the line is to be drawn as to what amounts to a total failure of consideration. The contract was for several loads of straw in installments, each to be paid for upon delivery. After some of the loads had been delivered the party to whom delivery was being made refused to pay for the last delivered, saying he would hold one payment in hand to have a check on the one delivering. It was properly held that the refusal to pay for the delivery of the remaining installments upon delivery as agreed, was an abandonment of the contract. It was a total

failure. The difference in the breach between the Naylor case and the Reynolds case was, that in the former there was merely a failure to pay at time of delivery and no refusal to pay for either the installment delivered or any intention evinced not to pay for future deliveries contracted for; while in the latter there was an attempt to substitute something materially different from that agreed upon, that is, a refusal to pay upon delivery as agreed during the remainder of the contract to be performed. In the case of *Franklin* v. *Miller*, 4 A. & E. 599, Coleridge, J., commenting on the *Withers* v. *Reynolds* case, said: "Each load of straw was to be paid for on delivery. When the plaintiff said he would not pay for the loads upon delivery, that was a total failure, and the defendant was no longer bound to deliver. In such a case the party refusing has abandoned the contract."

Right here is a proper place to refer again to an erroneous idea that obtains among many lawyers and judges, that there are breaches of contract which would give rise to the right to rescind, and not at the same time the right to regard the contract as abandoned so as to recover damages. This opinion no doubt has arisen through the fact that in many cases parties have not sought damages for the breach, for there are many where rescission alone has been sought and obtained, in fact, in all probability, no damages could have been proved, and yet, damages might have been recovered because of the breach if they could have been proved. When Mr. Justice Coleridge said of the Withers case that such a breach amounted to an "abandonment of the contract" a "total failure," he meant that damages might have been recovered had they been shewn in the Withers case.

To further illustrate our point we take the case of *Palm* v. *Railway Company*, 18 Ill. 217, where there was a contract to furnish locomotives at stated periods, to be paid for when delivered. There was a mere failure to pay for one of the installments and an attempt was made to recover as for a total breach, the profits which might have been made from full performance.

The Court in refusing to allow such a recovery because of the mere failure to pay upon delivery as agreed, unless by express provision in the terms of the contract itself, said that such a breach might give rise to the right to rescind. But that is clearly a mistake, which the more recent decisions definitely shew, and yet the idea exists that a contract may be rescinded, though for the same breach there could be no recovery of damages other than those arising out of that particular breach. Suit could have been brought to recover for the particular installment not paid for in such a case.

The Courts are now definitely settled upon the rule that rescission can only take place when the acts and conduct of one party evince an intention not to be further bound by the terms of the contract, and that means that there has been a total failure, and is a question of fact for a jury. See Corbin's Ed. Benjamin on Sales, sec. 908. Also 62 Cent. L.J. 161. In this connection we advise the reading of a very able recent article by Mr. Graham B. Smedley, 65 Cent. L.J. 292. If the breach is not such as to evince an intention not to be bound by the terms of the contract it may not be regarded as going to the whole consideration. But whether or not it does is a question generally for a jury or Court sitting as a jury.—*Central Law Journal.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

PROBATE — CODICIL — FORM AND POSITION OF TESTAMENTARY PAPER.

In *Olroyd* v. *Harvey* (1907) P. 326 the validity of a codicil was in question. The peculiarity about it was that it commenced at the end of a prior codicil, and the first paragraph of it was written in a small space on either side of the testator's signature to the first codicil. Deane, J., held that the first paragraph of the writing could not be regarded, as was contended, as an interlineation of the first codicil, but that the two paragraphs of which the codicil was composed were entitled to be admitted to probate.

WILL—CONSTRUCTION—GIFT TO A PERSON FOR LIFE AND THEN "TO HIS SONS AND THEIR SONS IN SUCCESSION"—ESTATE TAIL—RULE IN SHELLEY'S CASE—DECLARATORY JUDGMENT—COSTS OUT OF ESTATE.

In re Buckton, Buckton v. *Buckton* (1907) 2 Ch. 406. This was an action for the construction of a will whereby the testator had devised certain real estate to trustees to the use of his eldest son George for life, and after his decease for the latter's eldest son for life "and then to his sons and their sons in succession" and in default thereof then to the other sons of George, and their sons in succession, according to the priority of their birth, and in default of male issue of George then to the testator's second son William for life, with remainder to his first and other sons and their issue in succession. The testator's son George had died and his eldest son had executed a disentailing deed so as to bar the entail and vest the land in fee simple in himself, and for the purpose of facilitating his future dealings with the land he brought the present action for the construction of the will making the trustees and the testator's son William a party. Kekewich, J., considered that the devise was governed by the rule in Shelley's case, and the decision of the House of Lords in *Van Grutten* v. *Foxwell* (1897) A.C. 658, and that the effect of it was to create an estate tail in the plaintiff, which had been effectually barred. Upon the

question of costs he gave a considered judgment in which he discusses the principles on which costs should be awarded in cases for construction of wills, and gave all parties their costs as between solicitor and client out of the estate of the testator.

TRUSTEES—SETTLEMENT—POWER TO RETAIN INVESTMENTS—SHARES IN COMPANY—PROFITS DERIVED FROM OPTIONS TO TAKE NEW SHARES—SUBSTITUTION OF SHARES IN DIFFERENT COMPANY — UNAUTHORIZED INVESTMENT—ACCRETION—CAPITAL OR INCOME.

In re Anson, Lovelace v. *Anson* (1907) 2 Ch. 424. By a marriage settlement made in 1902 certain investments were vested in trustees upon trust either to allow the same "to remain in the present state of investment thereof" or with specified consents to sell, and invest proceeds in certain other investments, and pay the annual income of the trust property to the husband for life; after his death to his wife for life, and after the death of both, upon the usual trusts for the children of the marriage, and in the event of there being no children, for the husband absolutely. By clause 11 of the settlement, the trustees were authorized to exercise any preferential right that might be offered to them to subscribe for new or other shares in any company in which they held shares or stock, and dispose of the same, and the profits derivable therefrom were to be treated as income. One of the investments transferred to the trustees of the settlement consisted of 109 shares in the Northern Securities Company which was formed to acquire and hold shares in other corporations and held a large number of shares in the Great Northern Railway and the Northern Pacific Railway. In 1904, 99 per cent. of the Northern Securities Co.'s capital was cancelled, and the trustees received in lieu of their 109 shares, 32 fully paid shares in the Great Northern Railway and 42 shares in the Union Pacific and 1 share in the Northern Securities Company. In 1905 and 1906 the trustees received three options to take up new stock in respect of the shares held by them in the Great Northern Railway and Union Pacific Railway, and in the exercise of these options paid certain instalments, and in one instance sold the option. The husband having died the wife claimed the profits of these options as part of the income under clause 11 above referred to; but Kekewich, J., held that that clause did not apply because the shares of the two railways were new shares and not within the terms of

the clause authorizing the trustees to retain investments. He held, therefore, that they were in fact unauthorized investments and that the profits of the options were consequently not within clause 11, but must be deemed to be accretions of capital.

TRADE MARK—"MOTRICINE"—SIMILAR WORD ON REGISTER—"CALCULATED TO DECEIVE"—ONUS OF PROOF—"MOTORINE" TRADES MARK ACT 1905 (5 EDW. VII. c. 15) s. 9, s.-s. 4, ss. 11, 19, 21—(R.S.C. c. 71, s. 17).

In re Compagnie Industrielle Des Petrole (1907) 2 Ch. 435. This was an application to register the word "Motricine" as a trade mark for a spirit for motive power purposes derived from petroleum. The application was opposed by a company which had previously registered the word "Motorine" as the trade mark for a lubricating oil used for motors and other machines. The company disclaimed any exclusive user of the word motor. The applicants claimed that the word "motorine" should be removed from the register. Warrington, J., held that the word "motorine" resembled "motricine," and the onus lay on the applicants to shew that it was not "calculated to mislead or deceive the public," which onus he held they had not satisfied. The application to register "motricine" as a trade mark was therefore refused. He also held that the word "motorine" had "no direct reference to the character or quality of the goods," and was, therefore, a good trade mark under s. 9, sub-s. 4, of the Act, and the application to expunge it was refused.

COMPANY—DIRECTOR—LIMITED COMPANY APPOINTED DIRECTOR—COMPANIES ACT 1862.

In re Bulawayo Market Co. (1907) 2 Ch. 458. Warrington, J., held that there is nothing in the Companies Act 1862, to prevent a limited company from being appointed director and manager of another limited company, and that there is nothing in the Act which requires a company registered thereunder to have any directors. A petition presented for the compulsory winding-up of a company on the ground that it had appointed another company its director and manager, was refused.

INSURANCE—"WHILST AT PORT OR PLACE."

Maritime Insurance Co. v. *Alianza Insce. Co.* (1907) 2 K.B. 660 was an action on a policy of marine insurance whereby a ship

was insured against losses "whilst at port or ports, place or places in New Caledonia." Whilst within the geographical limits of New Caledonia, and on her way to a port in that island, the vessel struck on a reef and incurred losses; but Walton, J., held that such losses were not within the policy, and that the words "place or places" meant place or places at which the vessel might arrive with some object and not a place or places passed merely while on her way to some other point.

AUCTIONEER—PARTNERSHIP—BILL OF EXCHANGE—IMPLIED AUTHORITY TO PARTNER TO ACCEPT—TRADER.

In *Wheatley* v. *Smithers* (1907) 2 K.B. 684 the Court of Appeal (Williams, Moulton and Buckley, L.JJ), have reversed the judgment of the Divisional Court (1906) 2 K.B. 321 (noted ante, vol. 42, p. 635), on the facts. The question was whether a partnership of auctioneers were bound by a bill of exchange signed by one of the partners for the firm. The Court of Appeal found that the bill was for a purchase made for the benefit of the partnership and was authorized by the articles. It was therefore unnecessary to discuss the question, raised in the Court below, as to whether auctioneers can be considered to be traders.

PAWNBROKER—NEGLECT TO DELIVER TO PLEDGOR—REASONABLE EXCUSE—LOSS OF PLEDGE——PAWNBROKERS' ACT, 1872 (35-36 VICT. C. 93) S. 31—(R.S.O. C. 188, S. 21).

Allworthy v. *Clayton* (1907) 2 K.B. 685 was a case stated by a magistrate. The proceeding was under the Pawnbrokers' Act, s. 31 (R.S.O. c. 188, s. 21), against pawnbrokers for refusing to deliver up an article pledged, on tender of the amount loaned and profit. The magistrate found as a fact, that the defendants had lost the article and were unable to account for it, and that it was not in their possession; and the question was whether this was "a reasonable excuse" within the Act. The Divisional Court (Lord Alverstone, C.J., and Ridley and Darling, JJ.), held that it was and quashed the conviction.

SHIP—CHARTER PARTY—LAY DAYS—EXCEPTION OF SUNDAYS AND HOLIDAYS—LOADING DONE ON HOLIDAYS—IMPLIED AGREEMENT—DESPATCH MONEY—DAYS SAVED.

Nelson v. *Nelson* (1907) 2 K.B. 705 was an action to recover despatch money for days saved in loading a ship. By the

charter party "seven weather working days (Sundays and holidays excepted)" were "to be allowed by owners to charterers for loading" and for each day saved in loading the charterers were to be paid or allowed by the owners £20. The loading was proceeded with on two holidays excepted by the charter-party, but there was no evidence of any express agreement under which the work was carried on. The question was whether the two holidays were to be accounted as "days saved." An arbitrator agreed with the shipowners that such days were not to be accounted as "saved days," but he stated his award in the form of a special case. Bray, J., affirmed the decision of the arbitrator and the majority of the Court of Appeal (Williams and Buckley, L.JJ.) affirmed the decision of Bray, J., holding that an agreement must be implied that the work done on the holidays should be reckoned as "working days" under the charter party, and that consequently the charterers were not entitled to despatch money in respect of those days. Moulton, L.J., however, dissented on both points.

PRACTICE—JOINDER OF CAUSES OF ACTION—WAIVER.

Lloyd v. *Great Western Dairies* (1907) 2 K.B. 727 was an action originally commenced by the husband of a married woman, who was not a party, for recovery of possession of a house and for damages for wrongfully entering and depriving the plaintiff of the profits of a dairy business carried on there, and for mesne profits, and for an account of the profits of the business, and for an injunction to restrain the defendant carrying on the dairying business at the premises in question. No leave had been obtained prior to the issue of the writ to join the other causes of action with the claim for possession as is required by the English rules. The defendant entered an unconditional appearance. On notice to defendants a receiver was appointed of the profits of the business carried on by the defendants. This order was subsequently discharged on appeal, on the ground that the business was the property of the plaintiff's wife. Subsequently leave was given to add Mrs. Lloyd as co-plaintiff. Statement of claim was thereafter delivered and defendants obtained time to plead; they then applied to set aside the writ and statement of claim for irregularity, because of the joinder of other causes of action with the claim for possession without leave. Walton, J., granted the order; but the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) re-

versed it, holding that having regard to the order which was made adding the wife, leave had been impliedly granted to join the causes of action, and that such leave might be granted after writ issued, and that in any event their joinder without leave was merely an irregularity which it was competent for the defendants to waive, and that they had waived it.

PROMISSORY NOTE—SIGNATURE IN BLANK—DELIVERY TO AGENT FOR CUSTODY—FRAUDULENT NEGOTIATION OF NOTE BY AGENT —BONA FIDE INDORSEE FOR VALUE—ESTOPPEL.

Smith v. *Prosser* (1907) 2 K.B. 735 was an action on two promissory notes. The defendant denied liability. From the evidence it appeared that the defendant had signed the notes in blank and left them with an agent in anticipation that funds might be required to be raised in an emergency for the purpose of the defendant's business in South Africa, the defendant being about to visit England. The agent's instructions were that the documents were to be filled up for such amounts and negotiated in such manner as the defendant should direct by letter or telegram. In fraud of the defendant, and without any instructions from the defendant, the agent filled up and negotiated the notes and used the proceeds for his own purposes. The plaintiff was indorsee for value without notice of the fraud. Grantham, J., who tried the action, gave judgment in favour of the defendant, and the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) upheld his decision, holding that the defendant was not estopped from denying the validity of the notes as between himself and the plaintiff.

INSURANCE—ACCIDENT POLICY—CONDITION—IMMEDIATE NOTICE OF ACCIDENT—OMISSION TO GIVE NOTICE—INSURERS' LIABILITY.

In re Coleman's Depositories and The Life & Health Assurance Association (1907) 2 K.B. 798 was an appeal from Bray, J., reversing an award of an arbitrator on a stated case. By a policy of insurance issued to an employer to insure him against liability for accidents to his employees, it was provided that in case any accident occurred immediate notice of it should be given to the insurers, and the policy also provided that the observance and performance by the employer of the times and

terms set out in the policy so far as they contained anything to be done by him, were the essence of the contract. The circumstances in which the policy came to be issued were as follows. On December 28, 1904, the employer signed a proposal form for insurance, and received a covering note which contained no conditions. On January 3, 1905, the insurers sealed, and on January 9, delivered the policy in question to the employer, covering a period from 1st January, 1905 to 1st January, 1906, and contained the conditions above referred to. On January 2, 1905, a workman of the assured was injured, of which no notice was sent, at that time, to the insurers. Dangerous symptoms supervened, and on 15th March, 1905, the workman died. Notice of the accident was given to the assured on the 14th March, 1905, the assured paid compensation to the widow of the deceased, which he claimed to recover under the policy. The insurers repudiated all liability. The arbitrator was of the opinion that the condition as to giving notice was a condition precedent to the insured's right to recover, but Bray, J., reversed his award, and the Court of Appeal (Williams, Buckley and Moulton, L.JJ.) affirmed his ruling, but Moulton, J., dissented from the rest of the Court. The majority of the Court thought that, in the absence of evidence, that the employer knew of or had an opportunity of knowing of the existence of the condition as to notice at the date of the accident, the condition was one with which it was impossible for him to comply, and that as regards an accident happening before the assured had knowledge of the condition, the proper inference was that the insurers never validly imposed the condition on the insured, and, therefore, he was entitled to recover on the policy. Moulton, L.J., took the view that when the policy came to the hands of the assured he then knew of the condition, and if he had then, within a reasonable time complied with it, it would have been sufficient, but that a delay from the 9th of January to the 14th of March was inexcusable. He was also of the opinion that as the assured had accepted the policy in its present shape it was not open to him to rely on the prior interim receipt as being in any way a waiver of conditions actually contained in the policy.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] LOGAN *v.* LEE. [Oct. 17.

Evidence—Provincial laws in Canada—Judicial notice—Conflict of laws—R.S.C. 1906 *c.* 145, *s.* 17—*Negligence—Common employment—Construction of statute—*3 *Edw. VII. c.* 11, *s.* 2, *s-s.* 3 (*N.B.*)—"*Longshoreman*"—"*Workman.*"

As an appellate tribunal for the Dominion of Canada, the Supreme Court of Canada requires no evidence of the laws in force in any of the provinces or territories of Canada. It is bound to take judicial notice of the statutory or other laws prevailing in every province or territory in Canada, even where they may not have been proved in the Courts below, or although the opinions of the judges of the Supreme Court of Canada may differ from the evidence adduced upon those points in the Courts below. *Cooper* v. *Cooper*, 13 App. Cas. 88, followed. The plaintiff, a longshoreman, was engaged by the defendant, in Montreal to act as foreman on his contracts as a stevedore at the port of St. John, N.B. While in the performance of his work, the plaintiff went into the hold to re-arrange a part of the cargo in a vessel, in the port of St. John, and, in assisting the labourers, stood under an open hatchway where he was injured by a heavy weight falling upon him on account of the negligence of the winchman in passing it across the upper deck. The winchman had attempted to remove the article which fell, without any order from his foreman, the plaintiff, and with improperly adjusted tackle. In an action for damages instituted in the Superior Court at Montreal, *Held*, that the plaintiff was entitled to recover either under the law of the Province of Quebec or under the provisions of the New Brunswick Act, 3 Edw. VII. c. 11, as he came within the class of persons therein mentioned to whom the law of the latter province relating to the doctrine of common employment does not apply.

Atwater, K.C., and *Duff*, for appellant. *Lafleur*, K.C., and *H. U. P. Aylmer*, for respondent.

Que.] WINDSOR HOTEL CO. *v.* ODELL. [Nov. 5.

Finding of jury—Questions of fact—Duty of appellate Court.

In a case where there is conflicting evidence and the jury, on evidence properly submitted to them, have accepted the evidence on one side and rejected that adduced upon the other, the Supreme Court refused to disturb their findings.

Appeal dismissed with costs.

Heneker, K.C., and *Marechal*, K.C., for appellants. *R. C. Smith*, K.C., and *G. H. Montgomery*, for respondent.

B.C.] NEWSWANDER *v.* GIEGERICH. [Nov. 5.

Champerty—Maintenance—Malicious motive—Cause of action—Costs of unsuccessful defence—Damages.

A defendant against whom a lawsuit has been successfully prosecuted cannot recover the costs incurred for his defence as damages for the unlawful maintenance of the suit by a third party who has not thereby been guilty of maliciously prosecuting unnecessary litigation. *Bradlaugh* v. *Newdegate*, 11 Q.B.D. 1, distinguished. *Giegerich* v. *Fleutat*, 35 S.C.R. 327, referred to. Judgment appealed from, 12 B.C. Rep. 272, affirmed.

Davis, K.C., for appellant. *Lewis* (*Smellie* with him), for respondent.

Man.] MANITOBA FREE PRESS CO. *v.* NAGY. [Nov. 5.

Defamation — Printing report of ghost haunting premises — Slander of title—Fair comment—Disparaging property—Special damages — Evidence — Presumption of malice — Right of action.

The reckless publication of a report as to premises being haunted by a ghost raises a presumption of malice sufficient to support an action for damages for depreciation in the value of the property, loss and rent and expenses incurred in consequence of such publication. *Barrett* v. *Associated Newspapers*, 23 Times L.R. 666, distinguished. Appeal dismissed with costs.

Ewart, K.C., and *Hudson*, for appellants. *J. E. O'Connor*, for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] RIDEAU CLUB *v.* CITY OF OTTAWA. [Sept. 17.

Assessment—Social club—Liability for "business assessment."

The object of s. 10 of the Assessment Act, 4 Edw. VII. c. 23(6) is to reach the income derived by the land holder from the various occupations mentioned in the section carried on by him upon the land and perhaps indirectly the stock in trade and personal property belonging to the business, and "business" is something which occupies time and attention and labour, and is followed for profit, and a social club, having no capital stock and no dividends, profits or earnings to be divided among its members, although it furnishes meals and liquors to them and their guests, is not a club within the meaning of the section, and is not liable to a "business assessment."

Judgment of MABEE, J., reversed.

Travers Lewis, for the appeal. *McVeity*, contra.

Full Court.] [Sept. 23.

HAMILTON STEAMBOAT CO. *v.* MCKAY.

Appeal to Supreme Court—Extending time for appealing—Necessity for leave—Powers of Court of Appeal.

Time for allowing appeal extended and appeal allowed under section 71 of the Supreme Court Act, R.S.C. 1906, c. 139, *i.e.*, the security proposed to be given, approved of and allowed, although this might have been done by a single judge of this Court, seeing that the delay in procuring it to be done during the proper time, 60 days from the pronouncing of the judgment complained of (section 69), would seem to have arisen from the impression—probably a mistaken one—that leave to appeal was necessary, and no Court was sitting during that time to which the application for leave could have been made. Also leave to appeal granted, if necessary, quantum valeat under section 48 (*e*) of the Supreme Court Act.

Shepley, K.C., for plaintiffs. *F. Dickson*, for defendants.

Full Court.] RE NORFOLK VOTERS' LISTS. [Nov. 3.

Ontario Voters' Lists Act—Case stated by County Court Judge —"General question"—Specific cases.

Section 39 of the Ontario Voters' Lists Act, 7 Edw. VII. c. 4, only authorizes a County Court Judge to state a case for the consideration of the Court of Appeal upon some "general question" which has arisen or is likely to arise in the revision of the lists by the judge.

It is not competent for a County Court Judge to ask the Court to determine simple questions of fact arising in any particular case, nor within the competence of the Court to relieve him of his duty to find, in such particular cases as were here stated, whether, at the times necessary to confer a right to vote, a particular person was in good faith a resident of and domiciled in some particular municipality, and had continuously resided in the electorial district, as the Ontario Election Act requires.

Re Voters' List, Township of Seymour (1899), 2 Ont. Elec. Cas. 69, distinguished.

Cartwright, K.C., for the Attorney-General.

HIGH COURT OF JUSTICE.

Court of Appeal.] REX *v.* HARRISON. [Oct. 11.

Criminal law—County Court Judge's Criminal Court—Court of record—Right to issue writ of habeas corpus to—Certiorari in aid of refusal to discharge prisoner—Non-filing of papers in High Court and their non-return to County Judge's Court—Validity of conviction.

A prisoner charged with perjury, elected to be tried without a jury, and was tried at the County Judge's Criminal Court and convicted. An application to the judge to reserve a case was refused, but the judge postponed judgment to enable the prisoner to appeal to the Court of Appeal, which was accordingly made and refused. Subsequently a writ of habeas corpus for the discharge of the prisoner was obtained in the High Court, and a writ of certiorari issued in aid thereof, to which

a return was made, and an application then made for the prisoner's discharge, which was refused, on the ground that the writ of habeas corpus and the certiorari in aid thereof had been improvidently issued in that a writ of habeas corpus did not lie to the County Judge's Court, it being a Court of record, and the prisoner was remanded for sentence, which was subsequently moved for and pronounced, without any objection on behalf of the prisoner. Some time afterwards it was objected that there was no jurisdiction to pronounce sentence, in that the papers brought into the High Court under the writ of certiorari had not been returned to the said County Judge's Court. It appeared that the return to the writ and the said papers had never been filed in the High Court, but were apparently in the hands of one of the officers.

A motion for leave to appeal from the conviction, and for an order requiring the county judge to state a case was, under the circumstances, refused.

J. B. MacKenzie, for the motion. *Cartwright,* K.C., for the Crown.

Divisional Court.] ALLAN *v.* PLACE. [Oct. 12.

Appeal—County Court—Divisional Court—Time.

If the judicial opinion or decision in a case, oral or written, is not pronounced or delivered in open Court, it cannot be said to be pronounced or delivered until the parties are notified of it within the meaning of section 57 of the County Courts Act, R.S.O. 1897, c. 55, requiring appeals from the County Court to be set down for the first sitting of a Divisional Court commencing on or after the expiration of one month from the judgment order or decision complained of.

Kilmer, for plaintiff. *R. McKay,* for defendant.

Divisional Court.] VIVIAN *v.* CLERGUE. [Nov. 7.

Sale of land—Payment by instalments—Deed to be delivered when three-fifths paid—Right to use for instalments without tendering conveyance.

A vendor of land under an agreement of sale providing for payments of the purchase money in annual instalments with

interest, and that the purchaser so soon as he has paid three-fifths of the total purchase money with interest, shall be entitled to call for a transfer of the said lands upon executing a mortgage back to secure payment of the balance, is entitled to sue the purchaser for the payments falling due prior to three-fifths being paid, without alleging and proving that he has tendered a conveyance of the lands to the purchaser.

In the absence of special agreement the actual conveyance of the land, delivered or ready for delivery, is a condition precedent to the recovery of purchase money, but here by express agreement the conveyance was not to be made until three-fifths of the purchase money together with all interest had been made.

Douglas, K.C., and *Lefroy*, for plaintiffs, respondents. *Middleton*, for defendant, appellant.

Anglin, J.] REX *v.* FARRELL. [Nov. 13.

Liquor License Act—Conviction for second offence—Imprisonment—Habeas corpus and certiorari in aid—Right of Court to go behind regular conviction—Police magistrate—Territorial jurisdiction — Warrant of commitment — Clerical error—Depositions before magistrate—Absence of proof of previous conviction—Affidavit of magistrate—Defendant not allowed reasonable opportunity to make defence.

Held, 1. On a motion upon habeas corpus for the discharge of a person imprisoned under a conviction regular on its face, the Court will not re-hear the case or weigh the evidence or sit in appeal, but will examine the depositions returned upon certiorari granted in aid of the habeas corpus, to see if there is any evidence to sustain the conviction, and, if none is found, will discharge the prisoner; this is required by the language of R.S.O. 1897, c. 83, s. 5.

2. The police magistrate for the town of Brampton has jurisdiction, at the request of the police magistrate for the township of Toronto, to try a person accused of an offence committed in the township.

3. A prisoner will not be discharged because the warrant of commitment returned, by a clerical error, bears a date before that of the conviction upon which it is found.

4. The conviction of the prisoner returned purported to be

for a second offence of selling intoxicating liquor without a license, contrary to the Ontario Liquor License Act, and the sentence was four months' imprisonment as for a second offence. By section 99 of the Act the magistrate is required to reduce to writing the evidence of the witnesses, which is to be read over to and signed by them. The depositions returned failed to shew any proof of a previous conviction.

5. The magistrate's affidavit that proof of the previous conviction was, in fact, properly given, could not be accepted on the motion for discharge of the prisoner, and no evidence being returned to warrant the conviction for a second offence, which was essential to support the adjudication of imprisonment for four months, the prisoner was entitled to his discharge.

6. The prisoner was also entitled to his discharge on the ground that he was not allowed fair or reasonable opportunity to make his defence; he was served with a summons to appear the next day after service to answer the charge; he did so; the information was then amended so as to charge an offence upon a day other than either of those mentioned in the summons, and he was refused an adjournment; all of which, as well as other things in the proceedings before the magistrate, was contrary to natural justice.

T. J. Blain, for defendant. *Cartwright*, K.C., for Attorney-General.

Anglin, J.] [Nov. 13.

CANADA SAND, LIME AND BRICK CO. *v.* OTTAWAY.

Mechanics' Liens—Statement of claim—Computation of time for filing—Commencement of action—Long vacation.

The 90 days allowed by s. 24 of the Mechanics' Lien Act, R.S.O. 1897, c. 153, for commencing an action to realize a claim, are not to be computed exclusively of long vacation. Although such an action is begun by a proceeding called a "statement of claim," the Rules of Court with respect to the filing of the statement of claim in an action begun by writ of summons, are not applicable to it.

Where the last of the materials in respect of which the plaintiff claimed a lien were furnished on May 30, 1907, and the lien was registered within a month, but the action for the enforce-

ment was not begun by the filing of a statement of claim until September 23, 1907, it was held that the lien had ceased to exist.

Proudfoot, K.C., and *R. G. Agnew*, for plaintiffs. *W. A. McMaster*, for defendants.

Anglin, J.] RE SILVERTHORN. [Nov. 14.

Will—Construction—Devise to wife—Life estate—Power of Sale—Use of proceeds—Income.

The testator gave and devised to his wife "all my personal estate of every description for her own use and that my landed property and the balance that may be coming due on the . . . mortgage shall be disposed of after the death of my wife and shall be made into fifteen parts of which fifteen parts each of my sons shall receive two fifteenth parts and each of my daughters one fifteenth part, and that so long as my wife . . . lives she shall have the use of the landed property and either use it, rent it or sell it and use the money as she thinks best."

Held, that the interest of the wife in the landed property was a life interest only, with a power to sell the land, if she so desired, and, in that event, a right to invest the proceeds as she should deem best, and enjoy the income derivable therefrom during her life.

Middleton, for the executors. *W. H. Blake*, K.C., for the widow.

Province of Nova Scotia.

SUPREME COURT.

Russell, J.] MYERS *v.* WEBBER. [Nov. 7.

Married Woman's Property Act, R.S. (1900), *c.* 112, *s.* 18—*Wife carrying on business—Failure to file consent—Liability of goods to execution—Word "machinery."*

The goods of an insolvent were sold by the official assignee to W. who transferred them to the wife of the former owner

under the following agreement: "I hereby agree to allow Mrs. Elizabeth Webber to sell my goods amounting to $1,300 and the use of the machinery for 12 per cent. payable yearly, and if not satisfactory to me at any time I can demand my goods and machinery, and what is sold of goods must be made good by money."

Held, 1. As to all goods the character of which was changed either by labour or the addition of other materials they became the property of the wife and liable to be taken under execution against the husband because of failure to file the proper certificate (consent to wife doing business in her own name) with the registrar of deeds, but as to goods unsold or the character of which was not changed, and machinery they remained the property of W. and could not be taken.

2. Under the term "machinery" there must be held to be included everything that by the intention of the parties was not to be sold to purchasers.

Kenny, for claimants. *Whitman*, for respondents.

Longley, J.] BELL *v.* INVERNESS COAL & RY. CO. [Nov. 12.

Negligence—Operation of mine—Conveying workmen—Contributory negligence—Employers' Liability Act, R.S. 1900, *c.* 179, *s.* 3, *sub-s.* (*e*).

Defendant's coal mine was operated by means of a slope extending down some three thousand feet at an angle of about twenty degrees with levels and landings at each five hundred feet. Coal was brought to the surface by means of box cars running on rails up and down the slope, and the workmen were conveyed up and down by means of a "rake-of-cars" consisting, usually, of five cars. The cars were in charge of men known as "chain runners," whose duty it was to give signals for the starting and stopping of the cars to the engineer in charge of the motive power at the surface. Under the rules of the mine, when cars were standing still, one tap on the signal wire communicating with the surface, indicated to the engineer that the cars were ready to start, and when the cars were in motion, a similar signal notified the engineer to stop. Where workmen were to be brought to the surface, four taps indicated that the men were all in. Plaintiffs, who had concluded their

work on one of the night shifts, went to the landing of the level upon which they were working and asked to be allowed to board a "rake-of-cars" which passed down and were told by the man in charge that they were going further down to get two cars and would be back. On their return, plaintiffs boarded the car and the chief chain runner, instead of giving the usual signal required to be given when men were on board the cars, gave a single tap, and the engineer at the surface started the cars at a speed equivalent to that used when hauling coal. Plaintiffs had the opportunity of getting off at two levels at which the cars stopped to take on other men, but omitted to do so. In each case the cars were started with the same signal and, after leaving one of the levels, known at No. 4, ran off the track with the result that one man was killed and another so seriously injured as to incapacitate him for work for some months. The evidence shewed that the cars by which the men were proceeding to the surface were not the regular train or rake sent down for the purpose of bringing men to the surface.

Held, 1. The men having been permitted to get on the cars and not warned to get off, were not precluded from recovering, and that the man in charge of the signals was bound to use proper care in the protection of life.

2. The position of the chain runner in charge of the cars was equivalent to that of a person in charge of points, signals, etc., upon a railway within the meaning of the Employers Liability Act, R.S. c. 179, s. 3, sub-s. (*e*) and that the company was liable for his negligence.

3. The failure of the workmen to get off immediately when they noticed the error in the signal given, or, later, when the cars stopped at other landings and the same signal was given, was not such contributory negligence as to prevent them from recovering.

D. McNeil, for plaintiff. *D. McLennan*, for defendant.

Full Court.] CHISHOLM *v.* CHISHOLM. [Nov. 12.

Parent and child — Guardianship — Contract to pay money— Condition—Public policy.

Defendant offered to allow plaintiff a fixed sum of money per annum, payable quarterly, provided she would place her

daughter (defendant's grandchild) in one of two institutions named, and allow her to remain there until she had finished her education. Defendant stipulated that he should be appointed the child's guardian as a guarantee that her education should be continued in the institution in which she was placed until she had finished it, but added: "I have no desire to part you from your child; you can live in either place with her, or in any other place you may wish." In an action by plaintiff to recover an instalment due,

Held, that the contract was not illegal as against public policy, and that plaintiff was entitled to recover. *Humphreys* v. *Pollock* (1901), 2 K.B. 385, distinguished.

Harris, K.C., and *Stairs,* for plaintiff, appellant. *McInnes,* K.C., for respondent.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] CARR *v.* CANADIAN NORTHERN RY. CO. [Oct. 18.

Contract—Sale of land—Statute of Frauds—Part performance by taking possession—Mandamus.

After fruitless negotiations between the plaintiff and the defendant's right of way agent for the purchase of the land necessary for the construction of the railway through the plaintiff's farm, the plaintiff refused to allow possession to be taken until the terms of sale should be settled. He then handed to the agent a written statement of the terms upon which he would sell and permit possession to be taken, at the same time notifying the agent that if the company took possession of the land he would understand from that act that the company accepted and agreed to his terms. A few days afterwards, and without any further communication with the plaintiff, the company took possession and proceeded with and thereafter completed the construction of its railway across the plaintiff's farm.

Held, 1. The defendants had accepted the plaintiff's offer by their acts, and that a binding contract had been thus entered into. *Carlill* v. *Carbolic Smoke Ball Co.* (1893), 1 Q.B. 256, followed.

2. The taking possession of the land under the circumstances was a sufficient part performance of the contract by the defendants to take the case out of the Statute of Frauds.

3. If there had been no contract between the parties, the plaintiff would have been entitled to the alternative relief claimed by way of mandamus to compel the defendants to proceed to have the compensation for the land taken determined under the provisions of the Railway Act.

4. Relief by mandamus may be obtained by commencing an action for it under Rule 879 of the King's Bench Act. *Morgan* v. *Metropolitan Railway Co.*, L.R. 4 C.P. 97, followed.

Rothwell and *Blackwood*, for plaintiff. *Clark*, K.C., for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] TAYLOR *v.* CITY OF REVELSTOKE. [Nov. 14.

Health Act, R.S. 1897, *ch.* 91—*Isolation of infected premises by Medical Health Officer—Liability of Municipal Council for expenses of maintaining quarantined premises and inmates.*

Where a Medical Health Officer (appointed by a Municipal Council) acting in pursuance of a provincial statute, places a quarantine upon a building and its inmates, within the limits of a city municipality, the latter cannot be held liable for the cost of provisioning and heating the building during the period of isolation.

Martin, K.C., for appellants. *W. A. Macdonald*, K.C., for respondents.

Full Court.] BANK OF MONTREAL *v.* THOMSON. [Nov 19

Practice—Special indorsement on writ.

Plaintiff made application under Order XIV. for judgment for $2,056.48 upon a specially endorsed writ claiming on an endorsement of a promissory note and a guaranty. The affidavit in support of the application referred only to the note. Particulars being ordered, were delivered, but not verified, and they included the guaranty. They also shewed that certain moneys had been paid, which had been appropriated on account of the guaranty, and judgment was given for $1,382.04, and leave given to amend the indorsement on the writ by adding thereto the particulars delivered.

Held, on appeal, that the indorsement was bad, following the dictum of Cockburn, C.J., in *Walker* v. *Hicks* (1877), 3 Q.B.D. 8, that where a person is placed in a position of having judgment signed against him summarily, sufficient particulars must be given him to enable him to see whether he should pay or resist.

EXCHEQUER COURT—ADMIRALTY.

Martin, Lo. J.A.] CABLE *v.* SHIP SOCOTRA. [Nov. 8.

Wages of seamen left in port en route—Lawful discharge, what constitutes—Left behind—Merchant Shipping Act, s, 166 (1); *ss.* 30, 31, 32, 36, 37, 38, 39.

Plaintiff, shipped for a voyage from Shields, England, to Victoria, B.C., and return, was left at Los Angeles for medical treatment and remained there in hospital fifty days. The master left with the Vice-Council at Los Angeles on the 18th of July, a certificate of discharge under section 31, but this was not filled out until the 22nd of August, when plaintiff called at the consulate. The master also made an error in computing the amount of wages due. In an action for recovery of wages,

Held, that, in the circumstances, the leaving of the certificate with the "proper authority" was a sufficient "giving" thereof to satisfy section 31, but that, as there had been an error, though unintentional, in computing the wages, thus ne-

necessitating plaintiff bringing action therefor, he would be awarded his costs.

Lowe (*Moresley & O'Reilly*), for plaintiff. *Peters*, K.C., for defendant ship.

Irving, J.] IN RE SIMPSON. [Nov. 11.

Lunatic—Application by relatives for management of property of lunatic without security.

On an application under section 27 of the Lunacy Act for an order committing the management of the property of a lunatic, not so found, to the son and daughter, without security.

Held that the usual undertaking and security should be given.

Luxton, K.C., for the application. No one contra.

Book Reviews.

The law of Married Women's Contracts. By M. R. EMANUEL, Barrister-at-law. London: Butterworth & Co. 11 and 12 Bell Yard, W.C., Law Publishers. 1907.

This is a collection of authorities on the above subject, handy of reference and convenient. These good ladies have, entirely innocently, been an affliction as well as a source of much profit to the profession; or perhaps, it may be said, that the absurd conservatism of the judges who have persistently declined to pay any attention to the wishes of legislators, is really at fault. We trust the necessity for more law books on this subject will soon cease.

The law relating to Riots and Unlawful Assemblies. By the late EDWARD WISE. Fourth edition, by A. H. BODKIN and L. W. KERSHAW. London: Butterworth & Co. 11 and 12 Bell Yard, W.C., Law Publishers. 1907.

This is a very useful little book of 250 pages which ought to be in the hands of magistrates and others concerned in dealing with these matters. It includes the Treason Felony Act of 1848, and other enactments of a cognate character.

United States Decisions.

STREET RAILWAYS.—A street car company which carries a passenger beyond his announced destination, in a strange place, on a dark night, and refuses to carry him back, but compels him to leave the car, is held, in *Kentucky & I. Bridge & R. Co.* v. *Buckler* (Ky.), 8 L.R.A. (N.S.) 555, to take the risk of his injury in attempting to follow the directions of the conductor to walk back along the track, which course will take him past obstructions from which injury may result to him.

A passenger who went upon the platform of a car when his station was called, so as to be ready to alight, was held, in *Turley* v. *Atlanta, K. & N. R. Co.* (Ga.), 8 L.R.A. (N.S.) 695, not to be chargeable with negligence, as matter of law, where, when the train slowed down but failed to stop, he attempted to alight to avoid being carried beyond his destination, and was thrown to the ground by a sudden jerk of the train and injured.

APPURTENANCES.—The sale of a steamer and appurtenances was held, in *Gazzam* v. *Moe* (Wash.), 8 L.R.A. (N.S.) 793, not to carry a rudder which had been made for the boat while the old one was yet serviceable, but which had not been placed on board and might be used elsewhere, or an old crank shaft which had been displaced by a new one, but at the time of the sale was still on board. The question of what articles will pass as appurtenances upon sale of chattels is the subject of a note to this case.

PROXIMATE CAUSE.—The proximate cause of the injury to a passenger who is shoved from a crowded car by a seated passenger against whom he is pushed by the conductor's attempting to pass through the car, thereby causing the assailant to become angered, is held, in *Snyder* v. *Colorado Springs & C. C. D. R. Co.* (Colo.), 8 L.R.A. (N.S.) 781, to be the act of such passenger, for which the carrier is not responsible.

NEGLIGENCE.—A person who employs a livery team with a driver to carry him to a specified place is held, in *Cotton* v. *Willmar & S. F. R. Co.* (*Minn.*), 8 L.R.A. (N.S.) 643, not to be chargeable with the negligence of the driver in driving upon a railway track without taking proper precautions to ascertain the approach of a train. With these cases is a note reviewing the other authorities on imputed negligence of driver to passenger.

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